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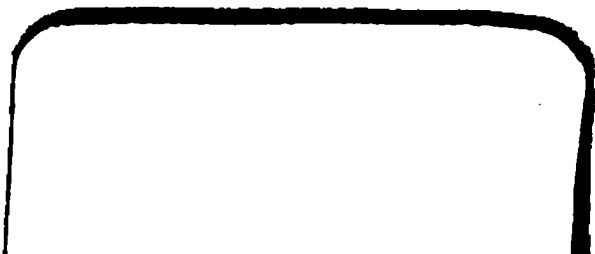
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
At Law and in Equity,
AND IN THE
EXCHEQUER CHAMBER,
In Equity and in Error,
FROM
HILARY TERM, 2 & 3 GEO. IV.
TO
EASTER TERM, 3 GEO. IV.
BOTH INCLUSIVE.
VOL. X.

By GEORGE PRICE, Esq. -
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:

S. SWEET, CHANCERY LANE; R. PHENEY, INNER TEMPLE LANE,
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BARONS
OF THE
COURT OF EXCHEQUER

During the Period of the Cases in this Volume.

Sir RICHARD RICHARDS, Knt. Lord Chief Baron.

Sir ROBERT GRAHAM, Knt.

Sir GEORGE WOOD, Knt.

Sir WILLIAM GARROW, Knt.

A

T A B L E

OF THE

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Those marked with an asterisk were decided by the LORD CHIEF BARON, sitting alone in Equity.
Such as have this mark †, were determined in the Court of Error from the K. B.
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OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

HILARY TERM,—2d & 3d GEO. IV.

MEMORANDA.

THE following Barristers, having been appointed to be of his Majesty's Counsel, were recognized by the Lord Chief Baron, on presenting themselves to the Court, according to the accustomed form, on the first day of this Term, and desired to take seats within the Bar :

W. E. TAUNTON, Esq. *Chancery Lane.*

C. PULLER, Esq. *Lincoln's Inn.*

W. G. ADAM, Esq. *Lincoln's Inn.*

L. SHADWELL, Esq. *Lincoln's Inn.*

E. B. SUGDEN, Esq. *Lincoln's Inn.*

1822.

Wednesday,
23d January.

Ros and others v. WILLOUGHBY and others.

Demurrer.

A covenant in a deed of separation, that the husband shall pay the trustee for the wife, an annuity for her maintenance, is binding on the husband, and may be enforced in equity, although there be no covenant on the part of the trustee to indemnify the husband.

A general demurrer to a bill for an account of assets and payment of such an annuity overruled.

In the argument of a general demurrer, laches in filing the bill cannot be taken into consideration by the Court. It should be pleaded.

THIS bill was filed in *July* 1821, for an account of assets, and an account and payment of the arrears of an annuity of 50*l.*, claimed to be due to the Plaintiff *Ann Ros*, under a covenant in a deed of separation executed between her and a former husband.

The Plaintiffs in the suit were the annuitant and her present husband, and the personal representatives of her trustee under the articles of separation, and her appointees; the defendants were the administrators (*cum testamento annexo*) of the deceased husband.

The bill stated, that in consequence of disagreements between the Plaintiff, *Ann Ros*, and her first husband, it was mutually agreed between them, that they should live separate and apart; that the husband proposed by letter to his wife's brother (her friend and adviser), to allow her 200*l.* a year for her life; that in consequence of such disagreements, and *for the purpose of carrying into effect the said intended separation*, articles of agreement were entered into (*dated in November 1784*), between the husband, of the first part, the Plaintiff, *Ann Ros*, of the second part, and her said brother
of

of the third part; whereby—after reciting the agreement to live separate, and that the husband had engaged to pay his wife an annuity of 150*l.* per annum, during such time as she should live separate from him; and that he had agreed to encrease the annuity by a further augmentation of 50*l.* a year, on the event of the death of a third person—the husband covenanted accordingly to pay the same to his wife, or to any person whom she should appoint by note or writing under her hand, by four quarterly payments: and also that he would, in case of the death of the said third person in the joint life-time of himself and wife, and in case they should live separate and apart from each other, and during such separation, pay her the said further sum yearly in the same manner. The bill then charged the death of the person on whose decease the further annuity of 50*l.* was to be paid, and that she died in November 1803, and that the arrears amounted, at the time of filing the bill, to about 750*l.*

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To that bill the Defendants put in a general demurrer, in support of which

Ellison now contended, that as the covenant on which the bill was founded, was entered into in contemplation of an intended separation between husband and wife, a Court of Equity had no jurisdiction to enforce such an agreement, and could not interfere. He submitted, also, that there was an objection in this case to the deed wherein the covenant was, which was the basis of this suit, in that

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there being no covenant on the part of the trustee to indemnify the husband against the future debts of the wife, it was wanting in consideration.

On the first point he cited the following cases: *Wilkes v. Wilkes* (a), *Fletcher v. Fletcher* (b), *Mildmay v. Mildmay* (c), *Hincks v. Nelthorpe* (d), *Legard v. Johnson* (e), *Head v. Head* (f), *Lord St. John v. Lady St. John* (g), *Worrall v. Jacob* (h), and *Durant v. Titley* (i).

On the 2d ground of objection, he cited *Seeling v. Crawley* (k), and *Legard v. Johnson*, submitting that in all the cases where the question had been raised, there had been in the deed a covenant on the part of the trustee to indemnify the husband.

He also urged, that in a case where so great a length of time had been suffered to elapse before the bill was filed, the Court, in coming to a decision, would admit the consideration of laches.

[The Court intimated that such an objection could not be considered on a demurrer; it could only be taken advantage of by pleading the Statute.]

(a) 2 Dickens, 791.

(b) 3 Br. Ch. C. 619, in notis.

(c) 1 Vern. 53.

(d) Ib. 204.

(e) 3 Ves. 358.

(f) 3 Atk. 295. 547.

(g) 11 Ves. 526.

(h) 3 Merr. 206.

(i) *Ante*, Vol, 7. p. 577 *.

(k) 2 Vern. 386.

* In the argument of this case, all the determinations in print are brought together.

Martin and *G. Richards* contra, in support of the bill, contended, that the covenant in this deed was good both at law and in equity;—that the Plaintiffs had stated such a case on the record as entitled the annuitant, as a creditor, to be satisfied out of the assets: and the Plaintiffs did not seek any thing beyond that, or require to have the agreement specifically performed. Their claim, they observed, was confined to the additional annuity of 50*l.*, which was a legal debt; and there was in this case no question between the wife and the husband's creditors. A deed of separation, they insisted, was, as a voluntary deed, as binding as any other voluntary deed; and no averment can impeach an instrument under seal. The Courts will give effect to a legal instrument, by which a husband binds himself to pay a trustee a sum for the separate maintenance of his wife, without regard to the question of jurisdiction to enforce articles for separate maintenance, as was held in *Seagrave v. Seagrave* (l). As to the trustees not having indemnified the husband in this case, that can make no difference, as it would be merely *nudum pactum*.

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On the general question, of the right of the wife to enforce such a claim so founded, they cited the following cases: *Fitzner v. Fitzner* (m), *Guth v. Guth* (n), *Hobbs v. Hull* (o), *Fletcher v. Fletcher* (p), *Rodney v. Chambers* (q), and *Jacob v. Worrall* (r).

(l) 13 Ves. 442.

(m) 2 Atk. 511.

(n) 3 Br. Ch. C. 614.

(o) 1 Cox, 445.


(p) 2 Cox, 99.

(q) 2 East, 283.

(r) 3 Meriv. 268.

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The recent case in the Court of Chancery, of *Westmeath v. Westmeath* *, was also cited as an authority on the same point, where the Lord Chancellor held, that the objections now taken did not afford ground for the interference of a Court of Equity to restrain a party from suing at law on a similar covenant in such a deed of separation.

Ellison replied.

RICHARDS, *Lord Chief Baron*. This is a case which, although the Defendants had a right to demur, involves a grave question, of too great importance to be disposed of on demurrer. If we allowed the demurrer, we should over-rule very solemn decisions. The question is certainly one of which great doubt has been entertained; and opinions have been expressed by Judges, disapproving the doctrine now settled and established, on which suits founded on articles of separation have been maintained. I am of opinion with Lords *Eldon* and *Loughborough*, that it would have been well if such contracts had not been held to be binding for any purpose; but the question is, not what the law ought to be, but what it is: and the opinions of Judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law. There is certainly great weight in the arguments, and in the authorities which have been brought forward in support of this demurrer; but we can not, on a demurrer,

* *Coram* Lord Eldon. This case is not yet in print.

presume

presume to overrule the express decisions of the determined cases.

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It was urged, that this claim could not be enforced because there was no indemnity given to the husband by the trustee. I cannot consider that circumstance as affecting this question; because, if the contract were integrally bad, such an indemnity would not make it good.

On the whole, I am of opinion that this demurrer must be overruled.

GRAHAM, Baron. There is certainly very great weight in the objections made to the enforcing a demand arising out of such a contract as this; but the determined cases leave no doubt about the legality of deeds of separation, or the right to enforce the payment of money stipulated to be allowed under a covenant therein, except indeed as against creditors of the husband. The language of regret is certainly found to be used by many of the Judges; but the law is clearly established, and such demands have been constantly enforced.

I do not think the want of an indemnity at all touches the question made in this case. I am therefore of opinion that the demurrer must be overruled.

WOOD, Baron, was absent.

GARROW, Baron, declared himself to be of the same opinion.

Demurrer overruled.

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Where it appears from the affidavits filed in opposition to bail, that they are persons of low condition and desperate circumstances, and such as ought not to have been brought before the Court to justify as bail, and they are rejected *instantly* on that ground, time will not be given to answer the affidavits, or for any other purpose.

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THE persons who came, pursuant to notice, to justify as bail in this case, having been rejected *instantly*, on very conclusive affidavits read respecting their circumstances, from which it appeared that there was no pretence for offering themselves for that purpose in the character of responsible housekeepers; the Counsel who moved the justification requested time *to answer the affidavits*; but

Mr. *Baron* GARROW (sitting alone) refused the application; saying, that in all cases where the bail were shewn to have been such as ought not to have been put in, he should refuse time for any purpose. He observed, that it was the business of those whose duty it was to put in bail, to pay some sort of attention to the situation and circumstances of the persons whom they offered to the Court as fit persons to take on themselves a real responsibility; and if they did not chuse to give themselves any trouble about it, (which, however, he observed, was frequently the least reprehensible part of such conduct,) they must take the consequence of their own neglect: and he added, that if the facts stated in the affidavit were false, the Defendant must have recourse to an indictment.

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At the sittings after last *Michaelmas* Term, *D. F. Jones* obtained a rule, that the Attorney-General should shew cause why the judgment which had been entered up on the verdict recovered for the Crown on the trial of this information, should not be arrested, and all proceedings under the execution which had been issued thereon, staid, upon an affidavit, made by the Defendant's attorney, stating that no evidence was adduced at the trial of any contract or agreement on the part of the Defendant, to take any greater number of persons on board his vessel, the *Charlotte Gambier*, than is permitted by act of Parliament;—that a summons was taken out by the Solicitor for the prosecution, to shew cause why the verdict should not be amended by entering the same on the third count of the information, which was attended by Counsel on behalf of the Defendant, and cause was shewn against it; whereupon the *Lord Chief Baron* refused to make the order required, but directed him to take the opinion of this Court thereon;—that to the knowledge of Deponent no application had ever been made upon the subject since the hearing of the said summons; but that the Solicitor for the prosecution had caused judgment

If, on an information by the Attorney General, for penalties for breach of a navigation law, the jury find a general verdict, and it be taken on a particular count, the Court will afterwards permit it on motion to be entered on any other count, if that elected should prove to be defective, or unsupported by the evidence as applied to the statute; for such informations are not to be considered as in the nature of *qui tam* actions on statutes merely penal, in which that cannot be permitted to be done.

A count framed on the 2d sec. of the 43 Geo. III. ch. 56, charging the owner of a ship with engaging to take on board a greater number of persons than allowed, held to be a good count, and to be proved by evidence of the owner being on board as master, and having such persons on board.

A rule—to shew cause why the judgment should not be arrested, on the ground that the count on which it had been entered up, was bad, and unsupported by the enactment and the evidence; and that the Attorney-General could not afterwards shift the verdict which he had elected to take on the count said to be bad,—discharged.

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judgment to be entered up on the first count of the said information ;—that no notice had been given on the part of the prosecution to the attorney for the Defendant of any proceeding on the part of the prosecution, since the *Lord Chief Baron* had so directed the opinion of the Court to be taken, up to the time of entering up the said judgment, and issuing execution.

The information was founded on the 43d of *Geo. III.* ch. 56. By the first section it is enacted, that it shall not be lawful for any master or other person, having or taking the charge or command of any British ship which shall clear out from any port in the United Kingdom, to have on board at or after being cleared out at any one time or from any place in &c., a greater number of persons, whether adults or children, including the crew, than in the proportion of one person for every two tons of the burthen of such ship ; such ship to be taken to be of such tonnage as is described in the certificate of registry : and if partly laden, it shall not be lawful for the master or other person having the command or charge of the ship, to take on board a greater number of persons, including the crew, than in the proportion of one person for every two tons of that part of such ship remaining unladen.

The 2d section enacts, that if any master or other person having or taking the charge or command of any such ship or vessel, shall take on board ; or if he or the owner or owners of any such ship

*ship shall engage to take on board a greater number of persons than in the proportion allowed, such master, or other person as aforesaid, shall forfeit and pay the sum of 50*l.* for each and every such person exceeding in number the proportion allowed: and every such ship shall be seized and detained by the collector or comptroller of the customs, until good and sufficient bail be given for the payment.*

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There were four counts in the information.

The 1st charged, that the Defendant, as *the owner of the vessel*, on the first day of June, 1819, engaged to take on board from some port or place in the United Kingdom, for or during the voyage, a greater number of persons, including the crew, than in the proportion of one person for every two tons of the burthen, viz. one hundred and twenty persons more than in the proportion allowed.

The 2d charged, that the owner engaged to take the passengers on board on the said 1st of June, 1819, and on divers other days and times between that day and the 1st of Oct., 1819.

The 3d charged the Defendant as *the person having or taking the charge or command* of the vessel; and that before her final departure, *he received on board* a greater number of persons, including the crew, than in the proportion before mentioned.

The 4th charged, that the Defendant, as the
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person having or taking the charge or command of the vessel, and after the clearance and during the voyage, had on board a greater number of persons, including the crew, than in the proportion before mentioned.

Upon the trial of the cause at the Sittings after *Trinity* Term last, it was proved on the part of the Crown, that the vessel was cleared outwards from Liverpool on a voyage for *Trinidad*, with seventy-six passengers, being the greatest number she was allowed to have on board under the 43 Geo. III. ch. 56: that the Defendant was at that time the owner, and hired a man named *Allison* as mate, although he ostensibly acted as the master; that he told *Allison* he should sail the ship himself, and *Allison* during the voyage acted under the Defendant's orders: that after her departure from *Liverpool*, and when the vessel was about fifteen miles outside the north west bay, upwards of one hundred and twenty persons were brought on board from *Liverpool* in two boats, and the vessel then proceeded on her voyage: that she anchored at *Queen's Bay*, in the Island of *Tobago*, to obtain provisions and water; and the Defendant, *Vew Llette*, and several of the passengers, proceeded to *Scarborough* by land: that the vessel was boarded by Mr. *Wilson*, the searcher, at *Tobago*, who mustered the passengers, and ordered *Allison* to proceed to *Scarborough*, as a proper examination of the vessel was necessary: but *Allison* having received his provisions just as he was entering the bay, altered his course, and proceeded to *Trinidad*, notwithstanding

notwithstanding the firing from the Fort, and the officer was obliged to come on shore : that the Defendant lodged with the witness, *Thomas Rochford*, who kept an Hotel, and *Rochford* and the Defendant had some conversation respecting the passengers on board the *Charlotte Gambier* ; when the Defendant told *Rochford* that the passengers came from *Ireland* in two vessels from *Liverpool*, and that he had got a security from the *Spanish General* at *Liverpool*, upon the *Spanish Admiral* in *America*, for 400*l.* or 500*l.* for the passage of the men.

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The question being put to the Jury, they found a general verdict for the Crown, which was afterwards taken on the first count, that being considered to be the most fully supported by the evidence.

In last *Michaelmas* Term, *Jervis* made a motion in arrest of judgment, upon the ground that the verdict was taken upon the first count, which charged the Defendant as owner of the vessel, with engaging to take on board, &c. whereas the act inflicts the penalty not upon the owner engaging, &c. but upon the master or other person having or taking the charge or command ; and there being no averment in the information of the owner being such master or other person, &c. that was a fatal objection to the count. He admitted that there was another count, the third, charging the Defendant in a different manner ; and if the verdict had been taken on that count, he could not have objected to it.

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The Court suggested, that if the rule were granted, it would not serve the Defendant, as the Attorney-General might apply for a cross rule to have the verdict entered upon the right count; for if the Judge's notes would sustain any of the counts, the Crown must have a verdict. Upon that suggestion, the motion was no further pressed.

The *Lord Chief Baron* was afterwards applied to on the part of the Crown, for an order to shew cause why the *postea* should not be amended by his Lordship's notes, in order that the verdict might be entered upon the third count; and a summons was granted, calling on the Defendant's Solicitor to shew cause why that should not be done. He attended for that purpose, and opposed the application, submitting, that it could not be done; and he cited the cases of *Holloway v. Bennett* (a), and *Hardy v. Cathcart* (b). The *Lord Chief Baron* entertaining doubts, refused to make the order; and suggested that the Court should be applied to for that purpose; but that not being, on further consideration, thought necessary on the part of the Crown, judgment was entered up, and execution was sued out.

At the last Sittings in *Gray's Inn Hall*, D. F. Jones obtained the present rule, on the authority of the case of *Holloway qui tam v. Bennett*; where it was held, that if in a penal action the Plaintiff elect to enter the verdict in one count,

(a) 3 Term Rep. 448. (b) 5 Taunt. 2.

he cannot afterwards be permitted to resort to another. He also cited *Hardy v. Cathcart*, Clerk (c), and *Spencer v. Goter* (d).

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The Attorney-General now shewed cause. He took a preliminary objection to the mode of proceeding, in that the rule had been obtained on affidavits; and therefore there could be no motion in arrest of judgment, as the ground did not appear on the record.

He then contended, that the count which had been objected to as not bringing the Defendant within the statute, and not supported by the evidence, had stated a sufficient charge against him, under the 2d sect. of the act, and that the offence was well proved; and he stated that he had refused to grant a certificate to enable the Defendant to bring a writ of error, because he considered the count to be good.

He also contended, that even if the Court should be of opinion that the count on which the verdict had been entered was bad, it was still open to him to move to have the verdict, which was general, entered upon a good count; and it had been admitted that all the rest were unobjectionable.

With respect to the fact of execution having been sued out upon the judgment, he submitted, that the Crown was entitled to do so, without giv-

(c) 5 Tantt. 2.

(d) 1 H. Bl. 73.

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ing any notice to the Defendant, on the verdict which had been obtained, and the judgment regularly entered up.


[The Court, however, intimated that execution ought not to have been sued out ; for although no proceeding was actually pending which brought the propriety of the verdict and the judgment into doubt, yet, after what had passed, and the considering the question made, which the Court had treated as of sufficient weight to require consideration, it should have been at least deemed equivalent to an understanding (even if there had been none in fact) that execution was not to be sued out in the mean time.]

It was insisted, that the 1st count was supported by the evidence as applied to the 2d section of the act, because the words, " other persons," must necessarily be taken to apply to all persons previously prohibited from doing what the act forbade.

But in all events, it was contended that the verdict might be entered on any other count : and, if that were necessary, it was proposed to move that it should be now done.

Jervis and *Jones*, in support of the rule, urged, that in cases of proceedings for penalties, the Plaintiff was bound by his election to take a verdict on the particular count, and could not afterwards change it—that this was unquestionably a proceeding to recover a penalty ; and that the authorities

thorities on which the rule was obtained, were therefore applicable to it.

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They then insisted, that the first count of the information could not be supported by the 2d section of the statute on which it had been framed; for even if the word "owners" had been omitted by mistake, it would be sufficient to render the clause inoperative as against them; that "other persons," clearly referred to persons having the charge and command of the ship; and there was no proof that the owner *engaged* to receive the men on board; and therefore on that ground the judgment ought to be arrested.

The Attorney-General, in reply, distinguished the case of immediate informations at the suit of the Crown, from ordinary *qui tam* actions on penal statutes; and he cited the *Attorney General v. King (a)*, to shew that this Court had so distinguished them.

The Court intimated, that further argument in opposition to the rule was unnecessary, and proceeded to deliver judgment.

RICHARDS, *Lord Chief Baron*. There are two questions to be disposed of in this case. The first is, whether the first count in this information is a good count, and supported by the statute and the evidence. We are of opinion that it is. That determination would necessarily render any consideration of the second question, which is, whether the Attorney-General may, in a case of this

(a) *Ante*, Vol. V. p. 363.

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sort, enter the verdict by obtaining an order of the Court for that purpose, upon any other count, altogether gratuitous ; yet, as the question has been raised, it may be useful, and it is competent to us to give an opinion on it. I am clearly of opinion that it may be done, where, under the circumstances of the present case, a general verdict has been found, although the proceeding be without doubt an information for penalties. The cases of *qui tam* actions on statutes merely penal, do not apply to informations at the immediate suit of the Crown for penal infractions of the revenue and navigation laws. Such latter proceedings are more in nature of civil suits, and they certainly have no analogy to criminal proceedings. They are instituted at the suit of the public, and for the public good ; and the Attorney-General is considered in the same situation as a Plaintiff suing for damages. We grant new trials in such cases to either party, on the common grounds ; and such cases are in all respects treated as civil suits. As I have already observed, however, it is quite unnecessary in the present case to consider that question, and I only state this as my opinion on the point.

As to the sufficiency of the count, the words of the statute are I think sufficiently large to comprehend the owners of ships, under the description given of persons offending against its enactments.

[His Lordship read the words of the section, commenting particularly on what he considered to be their import, with reference to the object of the statute.]

statute.] I am besides of opinion, (he continued,) that there is sufficient evidence on my notes, that the Defendant engaged as owner to take the men on board. The verdict is general—"Verdict for the Crown—one hundred and twenty men."

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GRAHAM, *Baron*. I am old enough to remember the first instance of the Court correcting a verdict by the Judge's notes; and I consider it a matter of indulgence to the parties to do so; for it is a course attended with great convenience. I fully concur in the distinction which my *Lord Chief Baron* has taken, between the nature of informations of this description, and *quæ tam* actions for penalties. I cannot hold the Crown, suing for the public good, bound and concluded by an accidental slip in taking a verdict, even if there were any error in one particular count, where there are other unobjectionable counts in the information; and I consider the Court takes a right course in treating such proceedings as they would common suits between subject and subject; but I do not mean to pledge myself to any decisive opinion, and it is not necessary in this case that I should; as being fully satisfied that the first count is good, it is unnecessary that we should determine that question. [His Lordship here also read and expounded the 2d section of the statute; and declared himself of opinion, that the letter and spirit of the act had clearly rendered the owner liable;—that so far from the word "master," being used a second time, excluding the liability of the owner, that word itself was a mere redundancy;—and the

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clause requiring bail, was a provision peculiarly applicable to the situation of the owner.] His Lordship, therefore, concurred in determining that this rule ought to be discharged.

Wood, *Baron*, was absent.

GARROW, *Baron*. I am glad to find myself now supported by the opinion of the Court in what I suggested on the former occasion as the course which I considered the Attorney-General might pursue if pressed by this objection. I also am of opinion, although in this case it is not necessary that I should state it, that on a general verdict being found for the Crown on such an information as this, the Attorney General may change the count, on motion, from that on which he first elected to take it; for a general verdict, authorizes the Court to transfer the verdict to any count within the four corners of the information.

But I am of opinion, that in this instance there is no defect in the count. The discussion, however, may be of service, if it be only to make a large portion of the community aware of the beneficial enactments of this wholesome and humane statute, passed to protect the lives of the people of this country.

His Lordship here passed an earnest eulogium on the objects of the statute; which, he observed, ought to receive the most liberal construction, and could not for an instant be regarded as a
merely

merely penal act. (Having read the section on which the question arose.) It is only necessary to read the words to shew that there is really nothing in the objection taken to the counts in this information, which are founded on them. I am clearly of opinion that this rule should be discharged.

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Per Curiam.

Rule discharged.

DE VILE v. ARNOLD.

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THIS was an action of assumpsit, brought by the Plaintiff, who had been employed by the Defendant to put up the pipes and gas fittings for lighting the English Opera-House with gas, for the balance of the Plaintiff's account. An agreement was entered into between the parties, in writing, in which the Plaintiff undertook to do the work, subject to the approval of Mr. Leadbetter, and what-

ever

In an action brought on an agreement to pay money for work to be done, on the production of the certificate of a third person that he approved the work, (the declaration also having the common counts,) the Plaintiff produced, on the

trial a *Bill of Charges* for the work done, which had been submitted to such third person, (who, it was proved, had attended the progress of the work,) under which he had written and signed the following memorandum, "On examining the annexed bill, and considering the circumstances of the case referred to me, I am of opinion that a reduction should be made of 12l. 11s. 6d.;" but that person being afterwards called as a witness for the Defendant, stated, that he never had approved the work, but disapproved it, and would not have signed a certificate of approval: the jury, on the whole case, found for the Plaintiff.—Held, that the verdict of the jury ought not to be disturbed under the circumstances; and therefore the Court refused to make absolute a rule granted to shew cause why there should not be a new trial, on the ground that the action could not be maintained without proof of such certificate.

The Defendant should have asked, at the trial of the cause, for leave to move to enter a nonsuit.

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ever he objected to, to be altered accordingly; and Defendant engaged to pay him for it *on the production of a certificate of approbation from Mr. Leadbetter*, the superintendant of the Gas Light Company.

The declaration was framed upon that agreement, which it stated as the foundation of the action; and it contained the ordinary counts for work and labor, and a *quantum meruit*. All the special counts stated the assumpsit to have been made on condition of the production of the certificate by the Plaintiff.

The cause was tried before the *Lord Chief Baron*, at the last *Middlesex* Sittings in Term; when the Jury, to whom the question had been left, found a verdict for the Plaintiff for the amount of his demand.

Wilde obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the Plaintiff had not proved that *Leadbetter's* certificate of approbation of the work had been, according to the terms of the agreement between the parties, procured by the Plaintiff before the action was commenced, and produced to the Defendant; and that without it the action could not be maintained.

The *Lord Chief Baron* now read his report, which stated, that it was proved that the parties had entered into the written agreement; and that the Plaintiff having completed the work, applied
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for payment of the balance of his account; when the Defendant, without making any objection to the work, excused himself, by saying he had a heavy payment to make, but would see the Plaintiff soon. After having made several other applications, the Defendant at last complained of the work, and some of it was in consequence done over again. The Defendant, and a Surveyor employed by him, and *Leadbetter*, were in the habit of attending in the Theatre during the progress of the work, giving directions and suggesting alterations, which were made accordingly. When the bill of charges was presented to the Defendant, he said he would pay the balance when it should be signed by *Leadbetter*. The Defendant took the bill accordingly, and the contract, to *Leadbetter*, who wrote under the bill, "On examining the annexed bill, and considering the circumstances of the case referred to me, I am of opinion that a reduction should be made of 12*l*. 1*s*. 2*d*.; and he signed it. That paper was produced at the trial, and that closed the Plaintiff's case.

For the Defendant, *Leadbetter* was examined. He was the superintendant of the Company who supplied the Theatre with gas. He stated that he had not approved the work, but disapproved it; and that if he had been applied to by the Plaintiff to sign a certificate of approbation, he would not have done so; and that in signing the memorandum, he only meant to regulate the charges. He admitted much of the work was well done, and that it was still used in the Theatre.

Upon

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Upon that evidence, his Lordship left it to the Jury to say, whether, judging as well from what had been done between the parties under the agreement, all the circumstances considered, the certificate of approval by *Leadbetter*, had not been waved and dispensed with, or whether the signature by him of the memorandum at the foot of the bill, was not tantamount to a more formal certificate of approval.

Adam and *Carter* now shewed cause against the rule ; insisting, that under the circumstances, the evidence supported the case of the Plaintiff on the record, and the verdict could not now be disturbed.

Gaselee, who appeared in support of the rule, being called on by the Court, contended, that as this declaration was framed, it was indispensably incumbent on the Plaintiff, proceeding on the special agreement, to produce the certificate of approval of *Leadbetter* ; and that the signing the memorandum by him was not equivalent to such certificate ; for that merely regarded the amount of the charge and the prices of the work, but had nothing to do with the quality of it ; and therefore it ought not to have been left to the Jury to decide on the whole case. If the Plaintiff had proceeded on the *quantum meruit* count, the Jury should have been directed to find what the Plaintiff was entitled to for the work proved to have been well done, and no more ; and that subject to the stipulations on his part contained in the agreement under

under which the Plaintiff was engaged to perform it.

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The Court held, that the Jury were rightly directed, to find a verdict on the whole case; and that the general count would support the action upon the facts in evidence, and therefore there was no reason for disturbing the verdict. And they suggested, that if the Defendant had meant to rely on the objection now insisted on, he should have obtained leave at the trial to apply to the Court to enter a nonsuit.

Rule discharged.

JOSEPH v. SIMPSON, and others.

Friday,
25th January.

IN February, 1821, the Plaintiff filed his bill against *James Gilliland Simpson, William Simpson, and George Home Simpson*, and another person; *J. G. Simpson* and *W. Simpson* were resident in *England*, and *George Home Simpson* in *Scotland*.

Reference of an answer for impertinence is good cause against dissolving an injunction.

There was heretofore no time limited in this Court within which, on an answer being referred for impertinence, the party obtaining the order was

The bill prayed an account, and an injunction to stay proceedings in an action at law. The Plain-

tiff

bound to procure the Master's report, but now the report must be obtained within four days.

Applications to discharge orders for irregularity must be paid without delay; and it is no excuse for not applying that the Court did not sit since the order complained of was obtained; because the Lord Chief Baron may, since the statute 57 Geo. III. hear matters in equity in this Court on any day, and may adjourn for that purpose *de die in diem*. The Court of Exchequer, like the Court of Chancery, is now open as a Court of Equity, during the whole year.

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tiff obtained the injunction against *James Gilliland Simpson* alone, for want of answer, the action being in the names of *James Gilliland Simpson* and *George Home Simpson*, as co-partners. *George Home Simpson* afterwards filed his answer; subsequently to which *James Gilliland Simpson* and *W. Simpson* filed their joint answer. On the 3d of July, *James Gilliland Simpson* obtained the common order nisi to dissolve the injunction; the Plaintiff then obtained an order to refer the answer of *George Home Simpson* for impertinence; and on the 10th July, he shewed this reference for cause against dissolving the injunction so obtained for want of *James Gilliland Simpson's* answer. The Defendant *James Gilliland Simpson* being advised that this was irregular,

Beames moved, on the 28th of November, to discharge the order obtained on the 10th of July, for irregularity, with costs, and to dissolve the injunction absolutely.

The Court was of opinion that the order was irregular, and discharged it accordingly; but considering that the defendant was guilty of laches in not coming sooner, discharged it without costs; but they would not dissolve the injunction absolutely, and made an order nisi, to give the Plaintiff an opportunity of shewing cause during the Sittings after Term.

The Plaintiff under this order waited until the very last day of the Sittings, the 15th of December,

ber, when he obtained an order to refer the joint answer of *James Gilkiland Simpson* and *William Simpson* for impertinence; and he on the same day shewed that order for cause.

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Beames now moved to discharge that last order, as having been obtained on a motion made too late, according to the practice. He cited *Milner v. Golding* (a), where Lord *Kenyon* held, that a reference for scandal and impertinence was not cause for continuing an injunction; and an anonymous case in *Vexey* (b), where it was held, that a bill cannot be referred for impertinence after answer, nor after submitting to answer, as by praying time, &c.; and he contended, that as it was too late to shew exceptions for cause, which he must do within time, it was by analogy too late to shew impertinence for cause.

Wakefield, *contra*, relied on the practice as stated in 1st *Fowl.* 318; where it is said to be cause against dissolving an injunction, that the answer stands referred for impertinence, on the authority of *Swayne v. Mills* (c); and in the same book, p. 450, a case of *Wallis v. Atkinson* (d), is referred to, where it was ruled that an answer might be referred for impertinence, after an order to dismiss. He also cited, on the first point, *Hurst v. Thomas* (e), where this Court adopted the practice of the Court of Chancery in that respect.

(a) 2 Dickens, 672.

(d) 1 Fowl. Ex. Prac. 450.

(b) 2d Vol. p. 631.

(e) 2 Anstr. 591.

(c) 1 Fowl. Exch. Pract. 310.

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RICHARDS, Lord Chief Baron. Whatever may be the practice of the Court of Chancery, we cannot recognize it in this Court, where it is not consistent with the practice here. Whenever there is a rule of practice in this Court, we must abide by it, unless it be formally altered by order, as it may be, if it should be found expedient to do so. According to the practice in this Court, there is no time limited for referring for impertinence, as there is in the Court of Chancery, and as there is here also in the case of exceptions; and those subject matters of objection to answers, have no dependence on or connection with each other. For the sake of preventing delay, however, it is highly necessary that there should be some rule made to regulate the future practice in that respect.

The decisive answer to the present application, however, is the delay; for there appears to be no reason why it should not have been made to me before, as it might have been immediately.

[It was stated, that the order having been obtained on the last day of the Sittings after *Michaelmas* Term, it was impossible to apply before.]

The Lord Chief Baron. That did not preclude the Defendant from applying, because, since the statute of the 57. of *Geo. III.* this Court, like the Court of Chancery, is open all the year round. By that act, which empowers me to hear applications, I am enabled to receive them at any time; and

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and may for that purpose adjourn from day to day. This ought to be generally known, for the advantage of the suitors. I am therefore surprised, that in this case the Clerk in Court, who acts for the Defendant, should not have known that this application might have been made as soon as it was found to be necessary. On that ground, in consideration of the delay, I shall not grant this motion.

The Plaintiff also was dilatory in not applying for the order sought to be discharged till the last day of the Sittings. I shall therefore require that he procure the report within a week. There must be a general order made that it shall be procured in all cases within a limited time.

Motion refused *.

* Vide 2 Ves. and Beames, 292.—Ib. 40.—and 1 Swanst. 230.

GENERAL ORDER *.

It is ordered, that in all future cases, where orders are made to refer answers for impertinence, the party obtaining the order shall obtain the Master's report in four days.

*Friday,
25th January.*

The Master's report on reference for impertinence must be obtained in four days.

* This was the order made in consequence of what passed in the preceding case of *Joseph v. Simpson and others*.

DOE

1822.

Tuesday,
Nov. 20.

DOE, on the demise of HARRISON, v. ROE.

Where the affidavit of service of declaration in ejectment stated, that it had been left with the wife of the tenant in possession, *the husband having absconded*, it was held to be insufficient to found a motion for judgment against the casual ejector.

ABRAHAM moved for judgment against the casual ejector in this case, on an affidavit stating service of the declaration in ejectment on the wife of the tenant in possession ; and giving as the reason of such service, that her husband had absconded.

On that statement it was objected, that the service was insufficient, for the reason appearing on the affidavit. The principle of the rule, that service on a wife is good as against a husband, being founded on the presumption that they are living together ; and there being a positive allegation that the husband had absconded in the affidavit of service, the presumption is destroyed, and the service is therefore bad.

The Court allowed the objection to be fatal, and refused the motion.

Nil.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.DUNCAN and others *v.* WORRALL and others.

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Monday,
28th Jan.

THIS was a petition for a rehearing*, filed by the Plaintiffs, whose bill had been dismissed with costs, under the following circumstances, stated in the petition.

It alleged that the petitioners (who were underwriters) had filed a bill in this Court, in *June*, 1815, stating

* When the Counsel for the petitioners appeared on their part, to support the petition, the Lord Chief Baron observed, that the presenting the petition was a formality, and never brought before the Court; for, all that was necessary to be done, was to carry it to his Lordship's Secretary, who would deliver the order for the rehearing as a matter of course.

It is not an uncommon thing for counsel to move for leave to present a petition; whereas leave is not required. It is matter of right to present the petition, and that is indeed the first step in such cases.

jury finding a verdict for them, on the ground that the vessel insured was not neutral property, as she had been represented by the insured to be. The Plaintiffs in equity then presented a petition for a rehearing, on account of the question of costs, founding the prayer of the petition on the ground of their bill having been a bill substantially for relief as well as for discovery, because it had prayed that the policy might be cancelled. The Lord Chief Baron, on the rehearing, after expressing strong and emphatic reprehension of such a proceeding for such a purpose, and lamenting his being under the necessity of ordering such relief as erasing the Plaintiffs' names from the policy would be, made the order, but without costs.

His Lordship, in the course of the discussion, declared, on the authority of very long experience in cases of this sort, in the Exchequer, that he did not believe that any such case had ever been brought to a hearing; and discredited the dicta attributed to the Lord Chancellor, in the reports of the cases of *Jervis v. White*, and *Bromley v. Holland* (*ubi infra*), from which it was inferred, that it was the course in this Court to bring such causes to a hearing for the sake of the relief.

A bill was filed by underwriters, against whom an action had been brought on certain policies of insurance, for a total loss, praying an answer; that the policies might be delivered up to be cancelled; an injunction; a commission to examine witnesses abroad; and further relief. On the hearing, the bill was dismissed with costs, the Plaintiffs having a defence at law in the usual course. The trial at law proceeded, and the Defendants (the Plaintiffs in equity) succeeded in the action, the

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stating therein, that the Defendants, (who were an insurance broker, and the assignee of a bankrupt trader, for whom he had acted,) caused several policies of insurance to be opened at *Liverpool*, from *Charleston* to *Liverpool*, upon a vessel called the *Fernandina*, represented to be in the port of *Charleston* (*America*), and to be neutral property, valued at different sums in the different policies, and on the goods on board thereof, (cotton wool) as interest might appear; and that the Plaintiffs severally underwrote the said policies, for various sums each;—that at the time when the said policies were opened, and before the same were so underwritten, the broker produced and shewed to the petitioners a letter, written to and received by him from a merchant in *America*, dated *Charleston*, the material part of which is as follows: “Some of my friends
 “here are loading the fine *Spanish* ship *Fernan-*
 “*dina*, Captain *Frehado*, for your port, and to
 “your address, as also the whole of the cargo the
 “*Fernandina* is now taking in; [it then described the cargo, and stated it to be the wish of the shippers to insure, directing the broker to do so at a certain sum exclusive of premium, and to observe in all cases to value the property at the amount he should cover; and it added,] “*The*
 “*above to be done against all risks whatever*, at
 “and from *Charlston* to *Liverpool*, with leave to
 “carry two setts bills lading, and clearances for
 “*Lisbon*. The *Fernandina* is as good a vessel,
 “in all respects, and as well fitted for sea, as
 “any in port. She was *Spaniard* long before the

“war

" war. The cargo will be shipped as *Spanish*
 " *property*, and a clever active young *Spaniard*
 " will be on board to represent it. I don't myself
 " consider the risk 5*l.* per cent. It is however the
 " wish of the owners that *the whole is insured* ;
 " and you will of course get it done on the very
 " best terms you can, and by all means be careful
 " in having the policy worded as strongly as possi-
 " ble, so as to prevent all disputes in case of loss.
 " If it is possible to obtain a licence for this vessel
 " previous to arrival, by all means do it ; *observing*
 " *by the way, that the whole is neutral property.*"

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The petition then stated that the petitioners, (as they had also alleged in the bill) afterwards discovered, that the whole of the transactions in obtaining their subscriptions to the policies, was fraudulent—that there never was such a ship—that the Defendant, *Worrall*, the Broker, and the persons by whom he was employed to effect such insurances, had no interest therein, or in her freight.

The bill had also stated that the Plaintiffs had applied to the Defendant, *Worrall*, requesting him to deliver up the said policies to be cancelled ; and, (suggesting a pretence on the part of the Defendants, that the insurance was a legal and *bond fide* transaction,) that the ship and cargo sailed from the port of *Charlston* in *January*, 1813, bound to *Liverpool*, and had not since been heard of ; and that therefore the Defendant *Worrall* had since brought an action in the Court of King's Bench,

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Bench, against the Plaintiffs upon the said policies, as for a total loss. It then charged, that if ever there was such a ship, neither the ship nor goods on board at the time the insurance was effected were neutral property, but that the other Defendants, the traders, had purchased the ship, or some interest therein, and part of the cargo, in *America*, with their own money, and that they were British subjects: that the importation into this country of the cargo insured, was at that time illegal; and therefore the insurance was illegal, as no licence had been obtained: and that a subject of the United States of *America* had some interest in the ship or freight, and that *America* was then at war with *England*. The bill also charged a great variety of objections to the right of the Defendants to recover in the actions at law.

The petition then proceeded to state, that the petitioners had by their bill prayed that *the said Defendants might answer the premises—that the said several policies might be cancelled—and that the Defendants might be restrained by injunction from proceeding in the said actions* so commenced against the petitioners, or any of them, in respect of the said policies; [the bill had also prayed a commission for the examination of witnesses in *America*, and elsewhere beyond seas,] *and for such further relief as the nature of the case might require.*

The petition also alleged, that the Defendants filed their answer in 1817 to the petitioners' bill, wherein

wherein they (Defendants) stated that the ship, at the time of her sailing and being insured, was a *Spanish* ship, according to the Colonial laws of *Spain*, inasmuch as she was commanded by a *Spanish* captain, and navigated under *Spanish* colors, and had *Spanish* sailors on board:—that she was before, and at that time, the sole property of *British* subjects resident in *London*, in partnership in trade; that an agent of the partners having collected a considerable sum due to them in *America*, had purchased wool there, which he had shipped on board the said vessel for *England*; and that the whole having been insured according to the advice in the before-mentioned letter, was afterwards *totally lost by peril of the seas*; and that *England* was then in amity with *Spain*, and at war with *America*, but no licence had been obtained for importing the cargo of cotton wool.

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The petition finally stated, that the cause came on to be heard before the Lord Chief Baron, on bill and answer, and that *the said bill was dismissed out of the Court with costs**; and, —submitting, that the petitioners were aggrieved by that decree, as they were entitled to the relief prayed, inasmuch as the said policies were, *under the circumstances, void as against them*, and ought to be delivered up to them to be cancelled, with costs—they therefore prayed a rehearing.

* The bill was dismissed, on the ground that it was founded on matters, which, if true, afforded a defence to the action at law; and therefore, there was no equity on the part of the Plaintiff, to warrant the interference of the Court.

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Martin and Spence, in support of the petition, urged, that as the petitioners' bill was a bill not for a discovery and an injunction merely, but for *relief*, they were entitled to have the cause brought to a hearing, in order that the policies might be ordered to be delivered up to be cancelled, if the parties chose to proceed to a hearing for that purpose. They submitted, that as it appeared from the answer, that the representation of the vessel being neutral property, was untrue, the policies were effected under a misrepresentation, and therefore void, and ought consequently to be delivered up to be cancelled. In the case of *Law v. Law (a)*, a bond given in consideration of procuring an office in the Excise, was decreed to be delivered up to be cancelled. In this case the result of the action in the Court of King's Bench was, that the Court held, on a special case, that a nonsuit ought to be entered, on the ground that it did not appear that the ship was a neutral ship, and within the protection of the orders in council. Upon that ground, too, the Plaintiffs in Equity are entitled to have the instruments delivered up; as an instrument signed under mistake or misrepresentation, although void, will not be suffered to remain in the hands of the party who has so unduly obtained it, although it may be void. *Byne v. Vivian (b)*, *Bromley v. Holland (c)*. They urged also, that the question of the instrument being void, was a question depending on circumstances, and often purely a question at law.

(a) Forrester, 140.

(b) 5 Ves. 604.

(c) 7 Ves. 3. 16. 19. Cooper

9. S. C.

[The *Lord Chief Baron* enquired if there could be any instance produced of a bill for a discovery and an injunction by Underwriters in a case of this sort, having been brought to a hearing, and proceeding to a decree ; stating, that in all his practice in this Court, he had never known it ; for that such suits, frequently as they have occurred here, have never been followed up.]

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In *Jervis v. White (a)*, the Court ordered an instrument to be delivered up, although it might be the subject of an action ; and in that case the Lord Chancellor, giving judgment, says, “ In the great
“ variety of suits in the Court of *Exchequer*, upon
“ policies of insurance, which, from the frame of
“ the bill, could not be for discovery, though treat-
“ ed as such, but suits for relief, I agree with
“ the opinion of *Lord Chief Baron EYRE*, that the
“ Court could not relieve itself from ordering the
“ instrument to be delivered up, if the parties
“ chose it, instead of the arrangement that now
“ takes place. With respect to suits for notes of
“ hand, bonds, &c., that sort of course has been
“ taken ; but it is only within twelve or fourteen
“ years that it has been so general. It is said,
“ you can try every thing at law, the discovery
“ having been given. But I have considerable
“ doubt whether there is not sufficient ground for
“ the Plaintiff to say that, after they have tried an
“ action ; still, if he chooses, the instrument is to
“ be delivered up ;” and the remainder of the judgment much strengthens that reasoning.

(a) 7 Ves. 413.

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[The *Lord Chief Baron*. I am quite satisfied that the Lord Chancellor has entirely mistaken the opinion of the *Lord Chief Baron Eyre* in that respect, and I speak from great experience in this Court during the time that he presided in this Court.]

In *Kemp v. Prior* (a) also, the Lord Chancellor says, “Demands have frequently been recovered
“in equity, which now could be without difficulty
“recovered at law ; as in the case in the *Exche-*
“*quer* upon policies of insurance ; and others in
“which you may recover money that the policy of
“the law would not permit to be paid, as pay-
“ments upon a marriage brocage contract. If a
“bill was filed for such a purpose, and requiring
“a commission, it could not be met by demurrer,
“or otherwise, with the objection that the Plain-
“tiff might obtain the relief at law.” And in *Bromley v. Holland* (b), the Lord Chancellor says,
“It is not possible to maintain that the ancient
“jurisdiction is destroyed by the Courts of Law,
“for the first time taking cognizance of that sub-
“ject. So upon bills to have void policies of in-
“surance delivered (c) up, which in the cases in
“the Court of Exchequer is always prayed, and
“which may be, though they are not usually, fol-
“lowed up to a decree upon this principle ; that
“it is not unwholesome that an instrument should
“be delivered up, upon which a demand may be

(a) 7 Ves. 249.

(b) 7 Ves. 21.

(c) The Mayor and Common-

alty of Colchester v. Lowten.

See also 1 Ves. & Bea. 244.

“vexatiously

“ vexatiously made, as often as the purpose of vex-
 “ ation may urge the party to make it.”

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[The *Lord Chief Baron*. In speaking of the cases in the Court of *Exchequer*, the Lord Chancellor must have meant to advert to the filing merely of such bills here, for I am quite sure that there was no instance (for forty years at least I can speak, as within my own knowledge) of any one such bill having been followed up to a decree in this Court.]

They also cited Lord *Redesdale's* Treatise, for the doctrine there on this point; and the cases of *Noble v. Garland* (a), and *Allan v. Attwood* (b), relying particularly on the latter, as an authority that such bills were substantially bills for relief as well as for discovery.

Jervis and *Merrivale*, opposing the petition, urged, that as the object of it was merely to obtain costs, the Court would not, in a case of this sort, for that purpose alone, proceed to a rehearing of the cause, in order that a void policy, declared to be so by a Court of Law, might be given up to be cancelled; which, if it were relief, was so merely nominal, as that if the attempt should succeed, there could be no case put wherein some in-

(a) Cooper, 222.

found, by the Report, that the

(b) 1 Mad. 344. S. C. and question made there was, whether such a bill were demurrable to, as being a bill for a discovery praying relief.

19 Ves. S. C. *Ante*, Vol. 8, p. 522. That case was not then published. It will be

substantial

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substantial relief might not be suggested and prayed for that very purpose. The utmost relief that the interposition of the Court could amount to would be by an order in the nature of a perpetual injunction; and if such bills were to be considered as bills substantially for relief, the principle of allowing the Defendant's costs on a bill filed against him for a discovery*, would be rendered inapplicable to such bills when filed by underwriters in actions against them on policies of insurance; at least wherever the expedient should be resorted to of introducing a prayer for cancelling the policy, and for relief, which they urged ought not to be permitted.

They also urged, that it was matter of great doubt, whether the Court ought to order the relief prayed, and the instrument to be delivered up to be cancelled:—that the better opinion seemed to be, that they ought not, unless in some very few particular instances, under certain circumstances, and that also upon terms. In one part of the judgment in the case of *Bromley v. Holland (a)*, the Lord Chancellor says, speaking of the cases on policies of insurance in this Court, that they are *not usually followed up* by a decree, and not unless the instrument is such that a demand may be often vexatiously made upon it. And in the same case (b), on a previous occasion, the Master

* In Beames's Doctrine of Costs in Equity, p. 32, it is said "A Bill of Discovery should not be brought to a hearing; if it should be so, it must be dismissed with costs:" and he cites several authorities in support of the proposition.

(a) 7 Ves. 21.

(b) 5 Ves. 618.

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of the Rolls observes, "I do not deny that in some
" cases, in order to avoid suits, and to prevent
" the party being harrassed, equity will order the
" instruments that may be the subject of those
" suits, to be delivered up: but those cases are
" *very rare*, and the relief is *always upon terms*."

The note in Lord *Redesdale's* Treatise (a), also suggests a doubt of the jurisdiction of equity in that respect, except in very particular cases of probable mischief arising from the party being permitted to retain the instrument in his possession. In this case, the policy having been declared void by the verdict at law, cannot be used prejudicially to the Plaintiffs in equity; and if, at a future time, the Defendants should be furnished with better evidence of the neutrality of the vessel, they would then be entitled to sue on the policy, and it would be injustice to deprive them of the means on this bill.

The *Lord Chief Baron*, dispensing with the reply, which, his Lordship observed, he did with considerable reluctance and regret, delivered his opinion to the following effect:

I am now to consider this case entirely by itself, and without reference to any thing which may have passed at the trial of the action at law, or the result of it; for nothing which occurred upon that occasion has been brought before me by this petition. [Having stated the circumstances of the

(a) Page 104, N. (c).

case.]

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case.] If the charges brought forward by the bill could be substantiated, there can be no doubt but that they would make out a case amounting to a misrepresentation, on the part of the Defendants; of the circumstances under which the Plaintiffs were induced to underwrite the policies; and if it can be proved in any case, that a party, Plaintiff in a suit for cancelling an instrument, executed it under a misrepresentation, of which the Defendant may have been guilty, whereby he has been led to do so, a Court of Equity will certainly not suffer him to keep that instrument in his possession; and on this plain principle—that where the paper never would, but for such misrepresentation, have come to his hands, and the party has been imposed on, and his signature or seal obtained from him by means of a fraud, or such conduct as in equity is considered fraud, he cannot be suffered to retain it in his possession. Much has been floating in my mind during this discussion, as to what was formerly thought to be the proper course in all these cases; and I am actuated more by what has occurred within my own knowledge when I practised very much in this Court long ago, than by any other means which I now have of disposing of this question. I remember that *Lord Chief Baron EYRE*, who was always, we know, considered to be a strong-headed man, used to say that he considered bills for discovery and injunction by Underwriters, in these cases, as being filed for the most part merely with a fraudulent intention to create delay: and I never remember one to have been acted on further than the dissolving of the injunction; but

but I have some recollection of costs being applied for in one case, and, as I think, on this very ground, because there was a prayer for relief in the bill; and they were refused. On that occasion, the Court expressed its strong resentment against the introduction of such a prayer for relief, as having been introduced for the purpose of founding such an application, and in order to effect a fraudulent evasion of costs, which would otherwise have fallen on the Plaintiff; and I myself entertain the same feeling on the present case.

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Now, let me suppose that the Defendants, when they had put in their answer, and were entitled to move to dissolve the injunction, had not done so, for any reason which they might have had. In that case, the cause must have gone on to a hearing; and if the Plaintiffs had shewn sufficient equity, the Court would either have sent the case to a trial by a jury, in order to be rightly informed of the facts, if doubtful, or they would have decided it at once on the evidence before them, if they could do so without an issue. The result, however, of my sending the parties to an action at law, would be, that it would come back again to me on the return of the *postea*; and if I were then satisfied, I must act upon the *postea*. That would be by a decree, which would most probably get rid of the instrument, the question of the validity of which was the cause of my sending it to a jury; and in that case, I must have decreed accordingly.

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It has been much pressed, that the question of the instrument, the subject matter of the suit, being void or not, was a question for the Court of Law. Undoubtedly it was; and if no action on the policy had been tried, it would ultimately have come to the same thing: for I should, in a case of doubt upon the evidence, have sent it to a jury, to have satisfied myself of the fact; and if their verdict had been against the instrument, or if, upon the evidence before me, I could have decided that the Defendant's possession of it was the effect of misrepresentation on the part of the person who had obtained it, and claimed to avail himself of it, I must have ordered the paper to be delivered up to be cancelled. A jury or Court of Law could not make any such order; but if a jury should, by their verdict, declare the instrument to be such an instrument, or obtained under such circumstances as the party ought not to be allowed to enforce it, or make any use of the possession of it, ought I not to adopt, in that case, the same course as I should have pursued if I had myself so decided upon the evidence before me, without the assistance of a jury? (a)

I am therefore *driven*, however unwilling I am to do so, to accede to this application for a rehearing; and the result will necessarily be, that this document must be ordered to be delivered up, but without costs.

I am glad that this matter has been discussed

(a) *Vide Davies v. Dodd, ante, Vol. IV. 176.*

here,

here, as it has given me an opportunity of expressing an opinion on it, which may be useful, however sorry I may be to determine the point as I feel myself compelled to do. This is the first application of the kind that I ever remember to have seen, during an experience of forty-two years, and I hope and trust it will be the last: for if it should be likely to occur again, something ought to be done in order to protect suitors in the circumstances of these Defendants from the evil consequences of such a proceeding.

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and others.

It was suggested, that it might be sufficient if the names of the Plaintiffs were ordered to be erased from the policies. The Court ultimately made the following

Order—Let the decree be varied by striking out so much of the same as directs the bill to stand dismissed with costs, and instead thereof, let the Defendants' names be struck off the policy in the bill mentioned, so far as regards the matters in question.

No costs to either party—the deposit made on filing the petition, to be returned to the Plaintiffs.

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Tuesday,
29th January.

THE KING in aid of TROUGHTON v. BURBERRY.

The Court will not set aside any part of a record on motion, nor order a replication to a plea to an extent to be struck out because not consistent with, or at least not pursuing the facts stated in the affidavit on which the fiat was granted.

Thus where an extent *in aid* had been issued on a fiat founded on an affidavit, stating, that the Prosecutors of the extent were jointly and severally bound

by writing obligatory to the Crown, conditioned for the returning all sums of money which they should receive from the Collectors of Excise, which bond was still undischarged; and that they were indebted to his Majesty for money received by them from the collector for his Majesty's use: the Defendant having pleaded that they were not indebted to the Crown at the time of issuing the extent, by receipt of any money for the use of his Majesty, and for the answering &c. of which they were bound to the King by their said bond.—The Attorney-General replied, 1st affirmatively, in the words of the plea; 2dly, that the prosecutors of the extent did not pay to the Commissioners of the Excise money received by them from the Collector within twenty-one days after the receipt thereof, according to the condition of the bond (in the words of the condition,) but that the same remained in their hands after, &c. whereby the bond became absolute and forfeited: and there were two other replications, negating performance in the words of the condition of the bond; the Court refused to set aside the latter applications, on the objection raised by motion made for that purpose, that they were a departure from the statement in the affidavit on which the extent was founded and the fiat granted, and yet they might enable the prosecutor to succeed in supporting the extent, and obtaining judgment, although the affidavit should be wholly false, and the true circumstances such, as that if they had been known to the Baron when the application was made for the extent, it would not have been granted.

But the Court observed, that if on the trial of the cause there should appear any reason for considering the proceedings to be so framed, for the purpose of unduly obtaining an extent, which could not be supported, the Defendant would be protected by the Court, who would stay the proceedings after verdict; and on an application by the Defendant, would recollect that this motion had been made.

A Rule had been obtained by *West*, requiring the Attorney-General to shew cause why the replication which had been filed in this extent to the Defendant's plea, should not be set aside.

The rule was granted upon a motion founded upon an objection to the replication, that it was a *variance and departure from the affidavit* of the prosecutors of the extent on which the fiat for the extent had been obtained, and the extent itself had been issued.

The affidavit on which the fiat was granted stated, that the Deponent and his partners, (bankers,)

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ers,) the prosecutors of the extent, and their surety, *by a certain bond or writing obligatory, bearing date the 11th of April, 1820, became jointly and severally bound to his present Majesty King George the Fourth in the sum of twenty-five thousand pounds of lawful money of Great Britain, conditioned for the deponent and his partners returning all such sum and sums of money as they or either of them should receive from the Collector of his Majesty's revenue of Excise, for a certain collection called the Coventry collection, which bond was still outstanding and undischarged—that the Deponents and his said partners were indebted to his Majesty in 5585l. 17s. 8d. being so much money paid into their hands by the Collectors, &c. for the purpose of being remitted by them to the Commissioners of Excise in London, for his Majesty's use.* The affidavit then stated, that the said Defendant was indebted to Deponent and his said partners in the sum of 4520l. for money lent, with the ordinary allegations.

The condition of the bond was, that the obligors should pay to the Commissioners of Excise all sums of money, which they should at any time have or receive of or from the Collector of the Excise, or from any other person by the order of the said Collector within the space of twenty-one days next after the receipt or possession of such money; that they should give to the Collector a good and sufficient bill or bills for the money which they should have received or taken of or from the Collector, payable to the Commissioners or order within the space of

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of twenty-one days next after date, and should reimburse, pay off, discharge, and satisfy such money as his Majesty, or the Commissioners or Collectors should at any time incur, expend, lay out, disburse, be put unto, or be liable to pay for or by reason of such payment, possession, or receipt.

The plea stated, that the extent issued against the Defendants was an extent in aid of *Troughton* and his partners, and that *they were not*, nor were or was any or either of them at the time of the issuing of the said extent *indebted to the King, &c.* by the *collection or receipt of any money arising from his Majesty's revenue, and for the answering and securing payment over, or accounting for, of which said debt they were by the said writing obligatory bound to his Majesty.*

Replication stated, that *Troughton* and his partners, the Defendants, were or some or one of them was, at the time of the issuing of the extent, indebted to the King in the said sum of money in the said extent in that behalf mentioned, by the collection and receipt of money arising from his Majesty's revenue, for his Majesty's use, and for the answering, receiving, paying over, or accounting for, of which said debt to his Majesty they were, by the said writing obligatory, bound to his Majesty.

Secondly. That the Defendants did not, nor did any of them, from time to time, well or truly pay, or cause to be paid unto the Commissioners of Excise, the sums of money which they had and received

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ceived aforesaid from the Collector of Excise, within the space of twenty-one days next after the receipt and possession of such sums of money, according to the form and effect of the condition of the writing obligatory ; but on the contrary, afterwards, and after the making &c. and before the issuing of the extent, a large sum of money &c. was paid to, and received by them as from the collector ; and the same remained in their hands unpaid to the Commissioners for a larger space of time than twenty-one days next after the receipt of such sum, contrary &c., whereby the bond became absolute and forfeited.

Thirdly. That the Prosecutor did not give to the said Collector in the said condition &c. mentioned, a good and sufficient bill or bills for such sums of the King's money, as they did after &c. have, receive, and take of and from the said Collector, payable to the Commissioners or order within the space of twenty-one days next after the date of each such respective bill, according to the form and effect, condition &c. whereby &c.

Fourthly. That the said bills so given under, and in pursuance of the condition &c. were not punctually and duly accepted and paid to the Commissioners ; but on the contrary, that after the making &c. ten bills of exchange, which were given and paid by the Prosecutors, were dishonoured and unpaid, and were in the hands of the Commissioners of no use or value, whereby the said writ-

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ing obligatory became and was absolute and forfeited in law.

Upon these pleadings it had been submitted that the Prosecutors of this extent *in aid* had by their affidavit brought themselves within the provisions of the recent act of parliament; but by two of their replications to the Defendant's plea, they abandoned their original ground, and, making a different case, relied on matters which would support the extent, even if the affidavit on which it had been founded was false; and they might obtain a general judgment on those replications, although they alleged a state of things in which, if true, the fiat for the process ought not to have been granted. The variance was illustrated, by comparing it to an arrest made on an affidavit of debt, giving one cause of action, and a declaration setting forth another.

It was stated, that this mode of proceeding by motion had been adopted, because matters of practice could not be rejoined, and the Defendant could not demur; and the objection being founded on the affidavit, which formed no part of the record, it did not therefore appear on the face of the pleadings.

Clarke and *Tindal* shewed cause, insisting that the replications were sufficient; for as the Crown was entitled to plead double, and as there was nothing inconsistent in the case as made by the replications,

replications, there was no ground for setting them aside. They urged, that this was not like the case put, of an affidavit of one species of debt and a declaration in another. There was reason why, in that case, it ought not to be permitted, for persons becoming bail ought not to be misled, as they might be in such a case, if the affidavit to hold to bail stated a matter of account, and the declaration was on a bond. A man might be willing to become bail in one case, although perhaps he would not in the other. These replications did not make out a new and inconsistent case calculated to surprise, but they all related to, and depended on the forfeiture of the bond.

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West, in support of the rule, submitted, that as the affidavit on which the fiat had been granted and the extent obtained, contained certain statements which, in the case of persons suing out an extent, were since the 57 of *Geo. III.* ch. 117. sect. 4. necessary to enable them to sue out the process, and to warrant the fiat, as without that the Prosecutors would not have brought themselves within the proviso in that statute. Having done so, the replications should conform to the affidavit in respect of those statements, and should not abandon them in pleading, in order to put another case upon the record; the effect of which new case, as pleaded, would be that the replications would maintain the extent even though the affidavit should be false. To the first replication, he admitted, the objection did not apply. To the others it was that the rule had been directed,

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and the object of it was to confine the Prosecutors in their replications, to pleading facts consistent with those stated in their affidavit. He submitted, that if they were not to be so restrained by the interference of the Court, this mischievous consequence to Defendants would follow. An extent might be obtained against his Debtor by a Creditor, bringing himself within the description of persons still authorized so to proceed by the proviso in the statute, by the affidavit made and produced before the Baron; and when the Defendant had pleaded as here, denying the facts, the Prosecutor might, nevertheless, under cover of another, or several other replications, succeed in the result of the proceeding, by obtaining a general judgment on some one of the issues, although the affidavit, and the replications consistent with it, might be negatived by the verdict on the other issues, and although the Prosecutors had never received any of the Crown's money,—in which case they would not have been entitled to use the Crown process. The replications following the first, he stated, could only be of use to the Prosecutors, in case the affidavit on which the extent was founded, was false, and could not be supported by the evidence necessary to prove the first replication. In short, if such pleading were permitted, it would have the effect of enabling parties to evade the restrictions imposed on issuing extents by the recent statute diminishing the number of persons entitled to use the Crown process, and confining it to Crown debtors of a particular description, there enumerated.

The

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The Court enquired why the replications objected to had not been met by demurrer : to which it was answered, that the affidavits being no part of the record, the objections did not arise on the pleadings ; and if there were even a still greater discrepancy between the affidavit and the replication, the Defendant could only be relieved by the interference of the Court in the way now sought. The extent only sets out the bond, and the onus is on the Defendant to make a case.

Per Curiam. We think it impracticable to get rid of any part of the record in the manner proposed ; but if the fact should eventually prove to be, as it is suggested it may, a fraud to procure an extent by persons not entitled to the process, the Court may in good time interpose to prevent the injustice of such a device ; for we would stay proceedings after verdict in such a case. It would certainly be a gross abuse of the process, and a contempt of the Court ; and if it should be so, the Court no doubt will find means at once to protect the Defendant and make an example of the Prosecutor. At present, we cannot interfere to controul the pleadings upon any thing which may be found in the affidavit on which the fiat was obtained, for which purpose only it was made and used. If it should hereafter become necessary, the Defendant will have the advantage of having made this application to the Court, and it will certainly not be forgotten. The rule must be discharged.

Rule discharged.

IN

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IN THE EXCHEQUER CHAMBER.

[Error from the King's Bench.]

DUNBAR v. DUNN, Assignee, &c.

*Tuesday,
29th January.*

A Sheriff taking a bond with sureties from a tenant replevying his goods distrained for rent, is not bound to pursue in every respect the terms of the 11 Geo. 3. ch. 19. sect. 23 : and a bond conditioned to prosecute the action (in replevin) with effect, and to indemnify the sheriff, is good, and may be assigned and proceeded on in the name of the assignee under the statute, although it do not require by the condition that the suit shall be prosecuted *without delay*, and although it contain an undertaking to indemnify the sheriff.

THE Defendant in Error, the bailiff of a landlord who had distrained for rent, had sued the Plaintiff in debt, as surety in a replevin bond to the Sheriff, which had been assigned to him. The condition of the bond was set out in the declaration as being (partly) in these words : that the principal should appear, &c. and “ prosecute his action with effect” against the Plaintiff below, for taking, &c. “ and should make return thereof, if return should be adjudged by law, and should well and truly keep harmless and indemnified” the Sheriff, his Undersheriff, &c. “ touching and concerning the replevying and delivery of the said goods,” &c. The declaration afterwards averred (having stated the proceedings in the County Court, and on the removal, and the result in the usual way, awarding a

Held, on a writ of error brought on objections founded on those grounds, that the one term is not exacted by the statute, nor the other excluded or prohibited ; and that neither the omission in the one case, nor the insertion in the other, is error.

It is not necessary, in an action on the bond, to aver that a return has not been made, although it appear on the face of the declaration to have been awarded, where it is averred that the suit has not been prosecuted with effect. A breach of either of the conditions for prosecuting with effect, returning the goods, or indemnifying the sheriff, will singly be sufficient to support the action.

a return) that the [principal in the bond] “ did not prosecute his said suit with effect, according to the form and effect of the said condition of the said writing obligatory, whereby the said writing obligatory became forfeited to [the Sheriff] so being Sheriff,” &c. It then averred the assignment by the Sheriff “ according to the form of the statute in such case made and provided,” (referring to the indorsement of assignment), stating that “ by means whereof, and by force,” &c. *actio accrevit* “ to the said now Plaintiff” (the Defendant in Error). “ as assignee of the said” (Sheriff) “ to demand and have of the Defendant” (Plaintiff in Error) “ the said sum,” &c.

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The Plaintiff in Error demurred generally to that declaration, in which the Defendant joined, and judgment passed for the Defendant (in Error).

This Writ of Error was thereupon brought, assigning specially for error, in substance, the following matters, besides general errors :

1st. That it was not alleged in the declaration that no return was made of the goods and chattels so replevied as therein mentioned, or of any part thereof, according to the form and effect of the condition of the bond ; by reason whereof it did not appear that it had been forfeited.

2dly. That it did not appear in or by the declaration, that at the time of exhibiting the bill against the

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the Defendant (in Error) as assignee &c. the bond was forfeited.

3dly. That it appeared in and by the said declaration, that the Defendant (in Error) sued as Assignee by virtue of an assignment to him of a bond, which being a *chose in action*, was not assignable by law, so as to give or vest in the assignee thereof a right of action thereupon in his own name.

Lastly, That the bond and condition were not in the form directed by the statute [11 Geo. III. ch. 19. sec. 23. *], or according to the effect thereof.

Littledale, for the Plaintiff in Error, contended that the errors assigned appearing on the record, the declaration could not be supported, and was insufficient to maintain the action.

They might be resolved into two objections:—
 1st, that it was apparent that the bond itself had

* Enacting that (to prevent vexatious replevins of distresses taken for rent) sheriffs &c. “ may and shall take in their own “ names from the plaintiff and two responsible persons as sureties, “ a bond,” &c. “ conditioned for prosecuting the suit with effect, “ and without delay, and for duly returning the goods and chat- “ tels distrained in case a return shall be awarded before any “ deliverance be made of the distress ;” and that such Sheriff, &c. taking such bond, shall assign it, &c. under his hand and seal &c. : “ and if the bond so taken and assigned be forfeited, “ the avowant or person making cognizance, may bring an “ action and recover thereon in his own name.”

not

not been taken, in pursuance of the statute, in a proper condition: and, secondly, that there were no such averments in the declaration as ought necessarily to have been introduced in order to support the action.

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The first objection was founded, first, on there not having been exacted from the principal in the bond, by the terms of the condition, an obligation to proceed without delay, which the statute has required to be made part of the duty of a person replevying his goods; and for good reason,—in order to prevent collusion, and protect the Surety from the prejudicial consequences which might arise from the Tenant's delay:—and, secondly, (which was the most important part of the objection) on there being introduced into the condition of the bond an undertaking to indemnify the Sheriff, thereby inserting a condition which the statute had not authorized, and converting the bond by means of that condition into a bond not warranted by the act, and consequently not assignable under or by virtue of it; for whatever right a Sheriff might have at common law to take a bond so conditioned, he could not sue in his own name on any such bond so taken, because the assignment to him was not a common law right, and therefore the present action could not be maintained on it. If Sheriffs could assign such a bond, they might take and assign bonds having conditions containing wholly irrelevant obligations, and thereby give to parties avowant or making conuzance, a right to recover for breaches quite foreign to the objects of.

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of the statute, and the intention of the Legislature *.

On those grounds, therefore, he urged, that of whatever effect such bonds might be in suits thereon by Sheriffs, they were nugatory and void in the hands of an Assignee.

As to the second objection—of the want of averments in the declaration to disclose to the Court sufficient matter to maintain his right to proceed to sue the Surety on the bond—he submitted, that it was necessary, in order to shew that the bond had been forfeited, that there should be an allegation in the declaration, not only that the principal had not prosecuted his suit with effect, but that he had not made the return of the goods and chattels which had been awarded. Upon that point he cited the authority of *Dampier, J.*, in the case of *Phillips v. Price (a)*, who is there reported to have said, that both parts of the condition must be negatived; if the party make a return, he need not prosecute his suit with effect; if he prosecute his suit with effect, he need not make a return.

[DALLAS, C. J., PARK, and BURROUGH, J. J., observed, that there were subsequent cases on that point, in one of which this question was very much considered.]

* If this argument were well founded it would be much strengthened by the consideration that assignments by indorsement of such bonds need not, by the provision of the act, be stamped until about to be put on the record.

(a) 3 Maule & Selw. 183.

The

The case of *Turner v. Turner* (a), it was submitted, was very distinguishable from this.

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[DALLAS, C. J., directed the attention of the Counsel to the case of *Morgan v. Griffith* (b).

BURROUGH, J.—It does not appear in the printed report of *Phillips v. Price*, that Mr. Justice *Dampier* was made aware of that case, or that he knew of it. It does not follow that there ever may be a return; for if the party proceeds under the statute of the 17 Car. II. (ch. 7. sec. 2) by inquisition, judgment of return might not be called for: and if it be possible that it might not be called for, it cannot be necessary on any principle of pleading, that it should be stated in the declaration that return was not made. It is only to be made *if awarded*.

RICHARDSON, J.—Suppose that after a long and expensive litigation a return should be made, when it would be of no avail. That could not be

(a) 2 Brod. & Bing. 107.

(b) 7 Mod. 380. The Court there ruled (upon the objection taken that there was no *retorna habenda* upon the judgment in replevin against the plaintiff); “that there was no occasion in this case for one; for in all replevin bonds, there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition; and the breach assigned in the present case is that the plaintiff in replevin did not prosecute with effect, so that a *retorn. habend.* was not at all material upon the breach in that case.” This case was decided recently after the statute.

considered

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considered to satisfy the bond, unless the party should also pay the costs.]

It was then urged, that in this case a return had been adjudged, which did not appear to have been the fact by statement in the declaration in any of the cases; and that where a return has been adjudged, the return ought to be mentioned, to give the parties a right to proceed against the sureties; for although it is said in *Tidd's Practice* (c), that where a Defendant proceed under the 17 *Car. II.* for arrearages of rent and costs, he cannot have a writ of *retorno habendo*; yet he cites no authority for that.

Reverting to the first objection, as to the form of the bond being inconsistent with the terms of the statute, the learned Counsel cited on that point the case of *Austen v. Howard*, from 7 *Taunt.* 327 (d), where a doubt is raised whether a replevin bond, to be assignable, must not conform to the directions of the statute in all points; but the Justices of the Court of *Common Pleas* disclaimed the entertainment of any such doubt in that case, which, they stated, was disposed of by compromise.

The Court finally declared they were clearly of opinion that the errors were not founded in law; that the condition to indemnify the Sheriff was consistent with the established form of replevin

(c) 7th edit. p. 1058.

(d) And see S. C. 1 Moore, 68.

bonds,

bonds, as used in practice; and that there was no necessity to pursue so strictly as it had been urged the Defendant ought to have done, the language of the statute in taking such bonds, as the 11 Geo. II. had not declared that bonds taken in any other than a prescribed form, should be void. They observed that the form of the bond now in use was common before the statute, and the condition was in every respect reasonable and unobjectionable; and that the Sheriff would be also entitled to take another bond for his own indemnity, if that part of the condition which was now objected to were to be excluded; the effect of which would be to put the party to the expence of two bonds.

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Per Curiam,

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.JOHNES *v.* LLOYD.SMITH (Executor of JOHNES,) *v.* C. M. LLOYD,
Widow.[By original and amended Bills, and Bills of Re-
vivor and Supplement].*Monday,*
*27th January.*Account be-
tween Attorney
and Client, al-
though long
since settled
and signed, will

THE first of these suits was originally instituted by bill, filed in *Michaelmas Term*, 1803, on the part

not be considered conclusive as against the latter ; and if any items of charge can be impeached, the accounts will be so far re-opened by the Court, on a bill filed for that purpose, as that the Plaintiff will be allowed to surcharge and falsify.

A case made out by the suit, will entitle the Plaintiff to an issue at law to try the fairness of the impugned charges, although founded on bonds set up ; and if he succeed in the issue, the Court will proceed with the investigation by reference to the Master.

A bond given by a Client to his Attorney, for the difference between a sum received by the latter, as a composition for a debt due to him from a Debtor of both of them, for the purpose of indemnifying the Attorney from loss by the transaction in having signed the general composition deed, held to be impeached by establishing that fact, and the amount intended to be secured by it falsified thereby, and disallowed by the Master on the reference to him of the charges set up by the accounts, and confirmed by the Court on exceptions to his report.

The Court on such a suit, will not re-open or disturb settled accounts, further than as to the particular charges that can be impeached ; and where fraud in respect of those charges is found by the Jury on the issue, that will not be sufficient to give the Plaintiff a decree for re-opening the accounts, if the fraud affect third persons, and not the Plaintiff, and was practised with the concurrence of the Plaintiff ; but in a case of Attorney and Client, it will let in the latter to set up the amount of any charges which he can impeach and falsify, and of any sums not credited to him in the accounts, to a credit for which he can shew himself to be entitled in deduction of the balance appearing against him taken from the foot of the accounts, without further disturbing the settled accounts.

Large sums in gross, as charged in such accounts, must be supported by detail of items composing them, or they will not be allowed.

All the costs of all the proceedings in Equity and at Law, of a Plaintiff succeeding in any respect, and to any extent however small, under circumstances of misconduct on the part of the Defendant, in a case where he has been the confidential professional adviser of the Plaintiff—given to the Plaintiff.

part of the Plaintiff, a gentleman once possessed of very considerable property in *Cardiganshire* and *Caermarthenshire*, against the Defendant, who had been for many years the Plaintiff's attorney, and general professional adviser, and who was at that time a country Solicitor in very considerable practice. The bill stated a complicated variety of pecuniary and professional dialogues and transactions * between the parties, commencing in 1788, and terminating in 1796, when an account was settled and closed; and it prayed that a general account might be taken of all such dealings and transactions; and that such account might be settled, and a balance ascertained under the direction of the Court;—that if any accounts between the parties should appear to have been signed by the plaintiff, they might be set aside, or that the plaintiff might be at liberty to falsify and surcharge the same;—that the bills of fees and disbursements of the Defendant, for all business transacted by him in the way of his profession of an Attorney at Law, and as Solicitor for the Plaintiff, might be referred to the proper officer, to be taxed (on the usual terms);—that all deeds &c. and securities for money &c. might be delivered up to the Plaintiff; and that satisfaction of all judgments &c. might be entered upon the records;—that if any balance

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LLOYD.

* Relating principally to the purchase on the recommendation of *Lloyd*, of an estate from one *Adams*, who was about to sell his property to pay his debts by composition with his creditors, amongst whom were both *Lloyd* and *Johnes*, through the medium of a solicitor in *London*, agent of *Lloyd*, and under cover of his name.

should

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should be found to be due to the Plaintiff, the Defendant might be decreed to pay to him the amount thereof;—and that the Defendant might be restrained from all proceedings at law &c.

The Defendant put in four answers to the bill, the three first having been held to be insufficient. The cause was ultimately brought to a hearing in *Hilary Term 1811*, when

The *Solicitor General (Plumer), Dauncey, and Johnson*, appeared for the Plaintiff, and

Leach for the Defendant.

The result of the hearing was, that an issue was directed to try the fairness of one of the impugned charges of the Defendant, namely, whether a sum of 1226*l.* 14*s.* 6*d.*, secured by a bond given to the Defendant by the Plaintiff, dated 24th of *December 1794*, charged against the Plaintiff in the Defendant's accounts, was justly due to the Defendant, the Plaintiff having admitted the execution of the bond.

On the trial the jury found a verdict for the Defendant at law, (the Plaintiff in Equity) and the *postea* was endorsed specially, (in substance) as follows, “*John Adams* being indebted to various persons in the sum of 51,305*l.* on mortgage of his estates in *Wales*, and being further indebted to other persons on judgments, conveyed certain estates, called the *Peterwell* and *Millfield* estates;

to

to trustees in trust, to sell, in order to pay the mortgagees, and divide the surplus amongst the other creditors, in exoneration of the estates, that the Plaintiff and Defendant were creditors of *Adams*, (*Lloyd* as representative of his father *Jeremiah Lloyd*, and as assignee of a judgment creditor, and *Johnes* also, upon a judgment recovered by him,) and they with the other judgment creditors of *Adams*, executed a composition deed dated in *February* 1795, under which *Lloyd* received 172*l.* 2*s.* 2*d.* for his demand of 1398*l.* 6*s.* 8*d.*, principal and interest, computed to 25th *December*, 1794;—that *Lloyd* was the first of the creditors residing in *Wales* who executed the composition deed, and that he did so to induce the other creditors in *Wales* to do the same;—that *Adams's* estates were purchased through the agency of *Lloyd*, by *Wallis*, a solicitor in *London*, in trust for *Johnes*;—and that the bond was given prior to the execution of the composition deed by *Lloyd*, to secure to him the difference between the sum of 1,398*l.* 16*s.* 8*d.*, (his demand on the judgment,) and the sum of 172*l.* 2*s.* 2*d.* received by him under the deed, and for no other consideration.

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JOHNES

LLD.

When the cause came on for further directions at the Sittings after *Michaelmas* Term 1811, the counsel for the Defendant urged, that one error having been established, was not sufficient to found a decree for opening the settled account; but admitted it might let the Plaintiff in, to surcharge and falsify.

1811.

13th *December*.

1822.

JOHNES

LLOYD.

For the Plaintiff it was contended, that the particular charge specified as error, and impeached by the finding of the jury, appeared by the *postea* to have originated in fraud: it was not only an error in itself, but it infected the whole of the accounts, by the imputation of fraud which it cast on them, and therefore they ought to be opened altogether; and more particularly in a case between attorney and client.

The Court [at that time consisting of *Macdonald*, Lord Chief Baron, and *Graham, Thomson, and Wood*, Barons,] however were of opinion, that as the fraud did not injuriously affect the party Plaintiff on this record, but the creditors of *Adams*, and as the Plaintiff appeared to have himself participated in that fraud, he had no reason or at least no right to complain of it, or to take advantage of it in this case. They therefore refused to open the accounts, but they determined that the Plaintiff had entitled himself to surcharge and falsify, on principles of public policy, considering the relation in which the parties stood, with respect to each other.

The order made thereupon, was, that it should be referred to the Deputy Remembrancer, to take an account of all dealings and transactions between the parties, without disturbing any settled accounts, except as ~~thereinafter~~ mentioned, but he was to take the account directed, from the foot of all such settled accounts, with liberty to the Plaintiff to surcharge the Defendant with sums received by

by him, (Defendant) and for his use, and omitted to be credited to the Plaintiff, in any such settled account, and to falsify all such charges or items as might appear to be erroneously charged against him therein; and the Defendant's bills of costs not included in the settled accounts were to be taxed; both parties to produce papers &c. with the usual directions.

1822.

JOHNES

LORD.

The original parties dying soon afterwards, the suit was revived by and against the representatives of each, and the same decree made.

In August 1820, the Deputy Remembrancer made his report, whereby he certified that four several accounts had been stated and settled between the parties, up to 1796, 1799, 1800, and 1801, and he reported that he found therein the following errors. In the account of 1796, the amount of the bond and the interest thereon, (stating the issue and special verdict already set forth) and he stated that he had therefore disallowed those charges: the report then stated that the Deputy Remembrancer had disallowed and falsified various other items of charge, for interest on that sum, with which he for that reason charged the Defendant, leaving a balance in favour of the Plaintiff of 6770*l.* 18*s.* 11*d.*, due from the estate of the original Defendant, to that of the Plaintiff; two of the many items disallowed, besides the amount of the bond, are all that it will be material to notice here, as connected with the facts of this complicated case, the detail of which very considerably

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siderably amplified the pleadings, and those only are all that are specifically noticed in the judgment delivered. Those were, first, a sum of 368*l.* 10*s.* 9*d.* (forming the subject matter of the 3d exception), charged in *Lloyd's* accounts, thus : “ 24th *December* 1794, to the deficiency of cash retained by Mr. *Wallis*, * from the purchase money of [*Adams's* estates], to pay the representatives of *Jeremiah Lloyd*, their principal, interest, and costs, secured on that estate, as per account, 368*l.* 10*s.* 9*d.*” (with 27*l.* 12*s.* 9*d.* for interest,) which was disallowed on the ground that the Defendant *Lloyd* had previously settled all his accounts as representative of *Jeremiah Lloyd*, and had accepted a sum in consideration of all such demands, and that such sum had in fact not been retained as stated. The 2nd was an item of 600*l.*, charged *in gross*, as costs and disbursements, incurred in respect of the sales of the said estates, the Deputy Remembrancer having found that no bills of costs had been delivered to that amount, and that other bills of costs, had been charged and delivered during the period.

* This gentleman, a solicitor in *London*, *Lloyd* had prevailed on, as it appeared from the pleadings and the evidence in the earlier part of the cause, to become the purchaser of the estates in his own name for *Johnes*, who was not at the time in the situation to make such purchase ; but *Lloyd* had, by misrepresentations of the advantage of the purchase, and promising to procure a loan for him of the necessary sum, which was very large, and for which *Johnes* was to give him 1000*l.*, the sum alluded to in the next exception, induced him to become the purchaser, to answer his own private purposes by getting paid by such means, desperate and disputed demands ; but in the end *Lloyd*, as it turned out, deceived them both.

fixed

fixed for such debit; and that *Lloyd* had been allowed 1000*l.* by *Johnes*, (as a *gratuity*) for what had been considered his services, in the course of the transactions relating to the proposed purchase of those estates. [The facts and suspicious circumstances, as well as the dishonest dealings of the parties as far as they are connected with the points of Equity in this case, are adverted to, and noticed in the judgment delivered by the Lord Chief Baron].

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LLOYD.

To that report the Defendants filed exceptions, which now came on for argument,

27th January.

Jervis and *Simpkinson* supporting the exceptions: and

Shadwell and *Pemberton* the report.

On the part of the Defendants it was urged, that the exceptions ought to have been allowed, for that the Deputy Remembrancer ought not, under all the circumstances as between *Johnes* and *Lloyd*, to have disallowed the sum due on the bond and the interest, and the other sums, forming the subject-matter of the exceptions. The objections raised to the report were attempted to be established on the facts of the case, and the statements respecting the accounts made in the pleadings, from which it was endeavoured to be shewn that the transactions in respect of the bond, (which it was contended the original defendant had a right to take as) could not be impeached in this suit, and

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and that the nature of the mutual dealings between the parties, who were at least in *pari delicto*, and the state and date of the accounts so long ago settled between the original Plaintiff and Defendant, precluded the questions which had been made, and ought to set all doubts and difficulties at rest. The authority and principles of the case of *Trueman* and *Fenton* were adverted to and relied on in support of the exceptions.

On the other hand it was insisted, that this was a transaction which a Court of Equity could not countenance; and having been brought forward, it must be dealt with according to the rules of Equity, the result of which must be, that the charges disallowed by the Master must be declared to have been properly disallowed.

1821.

Monday,
10th July.

RICHARDS, *Lord Chief Baron*.—I am disposed to let the seventh exception * stand over, in order that it may be ascertained what is the precise amount of the sum charged in the item which is the subject-matter of it. [His Lordship then stated the circumstances relating to the first and second exceptions, which were taken to the disallowance of the amount claimed to be due on the bond, and of the interest.] That bond, and consequently the charge (continued his Lordship),

* That stood over merely on account of a question of the amount of a sum charged to have been received by the defendant, on a levy made under writs of *fi. fa.*, on the plaintiff's goods by the Sheriff of *Cardigan*.

was

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was found and declared by the Jury to be a fraud, for that the sum secured by the bond was not justly due; and with the *postea* before us, we must look at all the facts there stated; and doing so—considering at the same time the relative situation of these parties, and the nature of their connection, it is quite impossible to say that these exceptions should not be overruled.

[His Lordship here stated the circumstances, and pointed out the objects and effect of the fraudulent arrangement.]

Throughout this case it must be kept in mind that the parties were Solicitor and Client; and even *Wallis*, connected as he was with *Lloyd*, must be considered as, to a certain extent, the Solicitor also of *Johnes*. In point of fact, both *Johnes* and *Lloyd*, between themselves, agreed to cheat *Adams's* other creditors, by falsely representing to them that the surplus of the produce of the sale of the estates would only pay them a small dividend; and *Lloyd* also deceived *Johnes*, by persuading him that it was a very lucrative purchase for him to make; and for this double dealing *Lloyd* was to have 1000*l.* paid to him by *Johnes*. Thus the man who was the confidential adviser of *Johnes*, his *client*, and who, as his attorney, must have possessed considerable influence over him, which he ought to have used for his advantage, as he would have done, if he had exercised any control over his own conduct from any sense of propriety,—not to deceive him as he did,—when brought into a Court

1892.

JOHNES

LLOYD.

Court of Equity, seeks to set up a demand to be remunerated for so abusing the confidence which had been necessarily reposed in him.

I am of opinion that the cases which have been cited by the Defendant's Counsel do not in any respect apply to this, where a solicitor is seen to act towards his client and others so immorally and illegally. I therefore entirely concur with the Deputy Remembrancer, and consequently these exceptions must be overruled.

The two next apply to the sum of 368*l.* 10*s.* 9*d.* The confused account given of that in the answers is quite inconsistent with the evidence of *Johnes*, *Lloyd's* clerk. It is a very unaccountable and unintelligible charge; and if it were any thing that could be insisted upon, it can only be as a gift; and if so, it cannot be urged, under the circumstances, as a demand subsisting against *Johnes*. Moreover, I am not inclined to give much credit either to *Lloyd* or his clerk, although judicially I must receive their evidence here. As far as the deeds go, however, I may believe what I find there. Those exceptions must also be overruled.

We now come to the exceptions to the disallowance of the 600*l.* charged for costs. I cannot help thinking that *Lloyd* has been paid; but whether he have or not, it is quite clear that a solicitor is bound to furnish a much more minute and explicit account than this, to justify such a charge brought against his client, and to such an amount; and yet

yet he merely debits him in this gross sum of 600*l.* as for costs, without any particulars given, or any explanation. Then there is besides the gift of 1000*l.* (acknowledged by the answers) to be set against it. That money I have no sort of doubt that *Lloyd* received, and that would alone be sufficient to preclude such a demand. I doubt if he could be allowed, under any circumstances, whilst there was a current account and transaction of business proceeding, to keep such a sum as a present gratuitously made to him by his employer. At all events it is quite clear that he cannot be allowed to retain both. A general observation applies to this part of the case, which I am desirous of making here :—It is, that a solicitor is bound to keep, and to be able to furnish, clear and detailed accounts at all times to his client ; and if he cannot do so, he must take to himself the consequence, and abide by the loss of charges which he cannot particularly account for and specifically sustain. In this all that is or all that can be urged in support of these general charges to so large an amount is, that they are items in a *settled account*. This exception therefore must also be overruled.

The seventh exception must stand over for the present.

All the other exceptions overruled.

THE cause now came on again to be finally disposed of on the equity reserved, and as to the general question of costs :

Pemberton

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JOHNES

v.
LLOYD.

1822.

27th January.

1832.

JOHNES

v.
LLOYD.

Pemberton, for the plaintiff, submitting, that in a case of this nature the Plaintiffs were entitled to all the costs in the cause, both at Law and in Equity: and

Jervis and Simpkinson, for the Defendants, admitting them to be entitled to the costs of the proceedings at Law, and of much of the costs of the suit in Equity, contended, that they ought not, in a case wherein there was, after all, much doubt, arising from the length of time which the original Plaintiff had suffered to elapse before he instituted this suit, to be given all the costs in the cause.

RICHARDS, Lord Chief Baron.—I consider the question now before the Court as one of very considerable, and perhaps I may say, of the greatest importance; for I hardly know any thing which more nearly concerns the interests of the community in this country, as immediately and vitally affecting the security of every man's private means, than that the conduct of the gentlemen who are authorized to act in this branch of the profession of the Law should be guided on every occasion by pure and unimpeachable integrity. Every individual in the kingdom, from the lowest to the highest, is or may be necessarily more or less connected with them, either directly or indirectly, at some time or another; and it is of the utmost consequence to the welfare of society at large, that the members of the legal profession should be men of probity and honour.

[His

[His Lordship stated the circumstances of this case.]

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Lloyd was, at the time when these transactions took place, an attorney in very extensive practice ; and consequently, as a man in very considerable business in his profession, largely and confidently trusted, in a manner involving very important concerns. *Johnes* was a man of very large property and estate. *Lloyd* was also possessed of considerable property, acquired in the profession of the law. *Johnes*, in consequence of being ultimately dissatisfied with the result of his connection with *Lloyd*, considered it necessary to file a bill against him ; and, from what the suit has brought to light, it appears to have been one which *Lloyd* ought never to have suffered to have been filed. *Lloyd* put in at first a very insufficient answer, and he was compelled reluctantly to put in three other answers ; and the result of the suit has been, that a very considerable sum of money is ultimately clearly shewn to be due from *Lloyd* to *Johnes*, notwithstanding these settled accounts.

Under these circumstances, can any one for a moment doubt, that a person so situated, and connected professionally with the Defendant, as *Lloyd* was, ought to pay the costs of such a suit ? A child would see that the Court had disgraced itself for ever if it did not order that the Defendant should pay all the costs.

It is said, that all the charges objected to in the
accounts

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accounts which have been brought forward, as having been improperly made, have not been shewn to be unfounded. Am I, in a case of this sort, between such parties, to enquire minutely as to a detail of items? It is true, that only a part of the sum alleged to be really due to the Plaintiff, if the accounts were gone into, is reported to be due to him. I cannot however believe, from what has been proved in the course of this cause, that the whole was not in fact due, although the Plaintiff has not been able to furnish sufficient proof to establish the fact so satisfactorily as to found a decree that the Defendant was indebted to him in the whole of his demand made by this bill, or in much more at least than the amount which the Plaintiff has been able to fix him with by positive evidence. I want no precedent for the order which I shall make; and should be ashamed of my authority, if it were not sufficient to enable me to make one in a case of this sort. I consider the case of *Vaughan v. Lloyd* (in *Brown*) in all respects in point (stating that case.) A judge sitting in Equity is not bound to believe all the statements in an answer. I remember Lord *Thurlow* saying, that he would not believe one of the answers of a Defendant in a particular case which came before him: and the result of that case shewed that he was clearly right in disbelieving it; for in the final answer put in by the Defendant, he completely contradicted what he had previously stated. The Plaintiff's Counsel, therefore, have very properly urged that the Plaintiff was obliged to proceed in this cause.

It

It is therefore, in my opinion, under the circumstances of this case, a matter perfectly of course to give the Plaintiff all his costs in this instance ; and the only question is, whether there are sufficient assets to afford him the full benefit of this decree.

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The Court ultimately made the following

DECREE.

Exceptions overruled.—

Report confirmed.—

Referred to the Master to compute subsequent interest on the sum of 3689*l.* 4*s.* 8*d.* the balance found due to the original Plaintiff *Johnes* from *Lloyd* on the 30th *June* 1804, from the 5th *August* 1820, and add such subsequent interest to 6770*l.* 18*s.* 11*d.*, the balance found due to Plaintiff *Hugh Smith* by the report,—and to tax the Plaintiffs their costs of this suit, and of the Proceedings at Law under the issue directed by the original Decree ;—the amount of such costs to be added to the 6770*l.* 18*s.* 11*d.* found due by the Deputy Remembrancer's report, and such sum as shall be found due for subsequent interest as hereby directed :—and for such amount the said Plaintiff *Smith* to be at liberty to go before the Master in Chancery to whom a cause of *Gibbons v. Howell* stands referred, and prove such amount, as a debt due to him as personal representative of *Johnes*, from the estate of *Lloyd*.

In

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IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, Lord Chief Baron.

Monday,
4th February.

Devise.

A testator, who was a mortgagee, devising all the real and residue of his freehold, leasehold, and copyhold estates in possession or reversion, together with all his goods, chattels, &c. mortgages and debts to a legatee, subject to the payment of his debts, &c. and also appointing the legatee executor of his will;—held not to have thereby devised the legal estate in the mortgaged premises to such legatee: and that such legal estate did not therefore vest in him, but descended to

SILVESTER, Bart. v. JARMAN and others.

THIS was an amicable suit, instituted for the purpose of taking the opinion of the Court, whether the legal estate in certain mortgaged premises was vested in the Defendants so as to enable them to make a sufficient re-conveyance of the premises to the mortgagors.

The bill stated that the Plaintiffs, Sir *John* and Lady *Silvester*, by indentures of lease and release of 20th and 21st October, 1797, the release reciting a bond debt of 5000*l.* due from Lady *S.* before her marriage, in consideration of the grantee, *Andrew Bone*, deceased, paying the said debt to the obligee, mortgaged the tithes and premises to the said *Andrew Bone* for the lives of certain *cestuis qui vie*, for securing the said sum and interest at 4*l.* 10*s.* per cent., and the obligee assigned the

his heir at law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises, which may be so devised; yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention of the testator that the legal estate therein should pass.

Parties.

Held, therefore, on a bill filed for a re-conveyance of the mortgaged premises, on payment of the money remaining due on the mortgage, that the heir at law of the testator was a necessary party to the re-conveyance of the estate.

the bond to *Andrew Bone*, appointing him his attorney to recover the sum secured thereby.

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SELVESTER,
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Andrew Bone died in *October 1800*, having by his will bequeathed to his son *James Bone* and his heirs *all the rest and residue of his freehold, leasehold, and copyhold estates*, except as therein excepted, which he might be seised of at the time of his decease, either in *possession or reversion*, together with all and singular his goods, chattels, monies, bonds, *mortgages*, and debts, which might be owing to him at the time of his decease, *subject as aforesaid to the payment of his debts, legacies, annuities, and funeral expences*. And he appointed him executor of his will. At the time of *Andrew Bone's* death, *John Bone*, his eldest brother, was his heir at law.

James Bone died in *February 1815*, having by his will devised and bequeathed unto his nephew the Defendant *John Jarman*, and to the other two Defendants, their heirs, executors, and administrators, *all other his freehold, copyhold, leasehold and other messuages, lands, and tenements, and all and singular his money, securities for money, and all other his estate and effects whatsoever and wheresoever, upon certain trusts therein mentioned*.

John Bone, *Andrew Bone's* eldest brother, died in *April, 1819*. By his will he had given *all and singular his real and personal estate*, of whatever kind and sort, situate in the county of *Southampton*, or elsewhere in *Great Britain*, that he was
seised

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seised of or entitled unto at the time of his decease, unto *Henry Hammond* and *Thomas Hatch*, and the survivor of them, and their heirs and executors, &c. *upon trust* that they his said trustees, or the survivor of them, should, as soon as conveniently might be after his decease, *sell and dispose of all his said real and personal estate, and to pay and apply the produce equally between his four daughters.* At the time of the death of *John Bone*, his said four daughters were his co-heiresses at law.

The bill then stated, that 3000*l.* only remained due on the said bond and mortgage, and that the Plaintiffs had applied to the Defendants to execute a re-conveyance of the mortgaged premises, and to procure the daughters of *John Bone* to join with them therein, offering to pay the money remaining due on the bond and mortgage, and which, at the request of the Defendants, had been invested in the purchase of 2702*l.* 14*s.* 1*d.* five per cent. navy annuities, in the name of Sir *John* and Lady *Silvester*, to await the determination of this Court. Then suggesting pretences on the part of the Defendants that the legal descendible freehold of the said mortgaged tithes and lands was, by the will of *Andrew Bone*, well devised to, and that it passed to *James Bone*, and his heirs and assigns, and under his will was vested in Defendants, their heirs and assigns; the bill charged that it did not pass by the said wills, but descended to the daughters of *John Bone*; or that, if it did pass by the will of *Andrew Bone* to *James Bone*, that it did not pass by *James Bone's*

Bone's will to Defendant, but descended to *John Bone*, or his heir at law; and on his death descended to, and was then vested in, the daughters of *John Bone*, as his co-heiresses at law; and that the Defendants alone were not competent to, and could not re-convey, without the concurrence of the daughters of *John Bone*.

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The bill therefore prayed that it might be declared that the descendible freehold of the said tithes &c. was then vested in the daughters of *John Bone*; that the money invested in the five per cent. navy annuities might be transferred into the name of the Accountant-General of this Court in the Bank books, in discharge of the money due on the said mortgage, to remain until the Defendants should procure a sufficient recognizance to be made to the Plaintiffs of the descendible freehold of and in the said tithes and premises, and that when such recognizance should be procured and delivered, the said sum should be transferred and paid to the Defendants, and that they might then deliver up the bond and indentures of lease and release.

But in case the Court should be of opinion that the said descendible freehold was well devised and passed by the will of *Andrew Bone* to *James Bone*, and by his (*James Bone's*) will to Defendants and their heirs, and was vested in them, then that Sir *John* and Lady *S.* might transfer the said sum and dividends to Defendants, in full satisfaction, &c. upon having a recognizance, &c.

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SILVESTER,

Bart.

v.

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and others.

This was an amicable suit, for the purpose of taking the opinion of the Court whether the legal estate in certain mortgaged premises was vested in the Defendants in such a manner as to enable them to make a sufficient recognizance of the premises to the mortgagors.

And three questions were raised : *First*—whether the legal estate in the mortgaged premises passed by the devise contained in the will of *Andrew Bone*, the original mortgagee, to *James Bone*, his son and devisee.

Secondly.—If it did pass to *James Bone* under that devise, whether it passed by the devise in *James Bone's* will to the Defendant, his trustees and executors : and

Thirdly.—If it did not pass by *Andrew Bone's* will to *James Bone*, but vested in *John Bone*, who was the eldest brother and heir at law of *Andrew Bone*, whether it passed by *John Bone's* will to his executors, or descended to his daughters and co-heiresses at law.

But as the devise in the three wills was so nearly alike that the same principle would govern them all, and as *John Bone* was the heir at law both of *Andrew* and *James Bone*, the argument was chiefly directed to the construction of *Andrew Bone's* will.

Roots and *G. Richards*, for the Plaintiffs, contended,

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tended, that the legal estate did not pass by *Andrew Bone's* will; and they argued that a mortgage was only a trust estate, under which the mortgagee had no power of dealing with the mortgaged premises but for the purpose of satisfying his debt; and that he could not convey the property by any words implying a direction to dispose of the same for any other purpose. That in this case it appeared to be the intention of the testator to charge his real estates with the payment of his debts; and as he had no such power to charge the mortgaged estate, it was evident he did not intend to include it in that devise—and they cited *Doe v. Reade*, 8 T. R. 118; and *Ex parte Morgan*, 10 Ves. 101. *Duke of Leeds v. Munday*, 3 Ves. 348. *Ex parte Sergison*, 4 Ves. 147. *Lord Braybroke v. Inskip*, 8 Ves. 417.

Barber and Wilson, for the Defendants, contended, that a mortgage was not a trust estate; that it was assets for the payment of debts: that it was evident in this case there was no intention to separate the money from the land; and that therefore the legal estate in the premises passed by the will of *Andrew Bone* to *James Bone*, and was by *James Bone* devised to his trustees, the Defendants. And they cited *Wall v. Bright*, 1 Jac. & Walk. 494; and *Silberschildt v. Schiott*, 3 Ves. & Bea. 45.

The *Lord Chief Baron* now delivered judgment.—Having ascertained that none of the parties objected to the question being now disposed of,

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of, notwithstanding the cause was not otherwise properly before the Court for the purpose of making an ultimate decree—his Lordship proceeded:

The question in this case is, whether the legal estate in the mortgaged premises is in the Defendants, who are the executors of *James Bone*, or whether it is in the executors of *John Bone*, or in his daughters, who are his co-heiresses, and also the co-heiresses of *Andrew Bone*. *James Bone* was the devisee of the mortgagee; and the first question will be, whether it passed to him as the sole executor and residuary legatee of *Andrew Bone*. *Andrew Bone's* will, therefore, will be the most important for us to consider here; because, if *Andrew Bone's* will does not carry the legal estate to *James*, of course *James's* will would not carry it to his devisees; and, as great pains have been taken by the Counsel in the argument on the effect of the will, I shall state my opinion on it.

In Equity, as in common sense, a mortgagee has the legal estate in the mortgaged premises only as a pledge for securing to him his money, and for the purposes of the mortgage; and, subject to such security, he is a trustee for the owner of the equity of redemption; and although he may devise the legal estate as such pledge, yet it always continues subject to the owner's right of redemption. A mortgagee has not, any more than any other trustee, a right, either substantially or in equity, to apply the legal estate in the mortgaged premises to any purposes of his own. We must therefore consider
with

with great care what is the nature of the devise upon which the question arises.

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I do not consider it necessary to examine the cases which have been referred to. It will be sufficient for the present purpose to say, it is now clearly settled that a mortgagee may devise the legal estate in the mortgaged premises as he pleases, and that the mortgage will pass under a general devise, if there be nothing in the will to the contrary; and the enquiry must therefore be, whether the testator has shewn any intention that the mortgaged estate should not pass. It has been held, that a trustee devising all his real estate *per se*, for purposes to which the trust property could not legally be applied, the necessary construction would for that reason be, that it was not intended to pass, because the objects of the devise were incompatible with the trust.

In this case the words of the devise are large enough to include the estate in question; and if there were nothing more in the will from which it could be inferred that it was not intended to pass, it would be a good devise to *James Bone* of the mortgaged estate. There are, however, words in this will from which it is clear that the property could not have been intended to pass; because he has devised his real property, subject to the payment of his debts, legacies, annuities, and funeral expences. These are objects to which clearly the legal estate in mortgaged premises cannot be applied. The money secured by the mortgage, certainly,

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tainly, may be so applied; but the mortgaged premises cannot. If the residuary legatee had been a different person, the legal estate in the mortgaged premises would not have passed to him, but would have descended to the heir at law—devised as it is with this incompatible qualification. It was said, that in this case the residuary legatee was also executor, and therefore entitled to all the personal estate of the testator, including the mortgage money; and therefore in giving him what he has bequeathed, he must have meant to have given him every thing he was capable of bequeathing. The answer to that is, that the legal estate in the mortgaged premises is not money; nor does it give any beneficial interest in the mortgaged premises beyond the securing the debt, and therefore it does not pass to the executor for the same purposes as the personal estate. It was also truly said, that the son was residuary legatee; but the same observation as I have made on the argument, that he was executor, applies equally, and indeed even more strongly, as it cannot appear at first whether the mortgage money may not be wanted for the payment of debts. Under these circumstances, and for these reasons, I am of opinion that the legal estate in these mortgaged premises was not devised to the legatee by the will of *Andrew Bone*, and consequently that they descended to the heir at law of the testator; and therefore the heir at law of *Andrew Bone* will be a necessary party to the re-conveyance of the mortgaged estate.

If, however, I should be wrong in my construction
 tion

tion of the will of *Andrew Bone*, according to the opinion which I have formed, that the legal estate in the mortgaged premises did not pass to the general devisee, because the devise was clogged with a charge to which the mortgaged premises could not be applied, then the question arises as to the effect of *James Bone's* will; and there again, although the words are large enough to pass the legal estate, if it were not for the trusts, I am of opinion that on that account it did not pass to his devisees the Defendants. The same observations which I have made on the other wills, will apply to *John Bone's*. He also devises his real estates in the same large way; but he also (and that is the important part of his will, as it affects this question) gives them upon trust, for a special purpose of his own—that is, to be sold, and the produce to be paid to and divided amongst his daughters; and it is quite clear that the legal estate in mortgaged premises cannot be so applied, for that is a much stronger case of appropriation than the others. I am of opinion therefore that the estate descended to the co-heiresses of *John Bone*. In that case it comes almost to the same thing; for *John Bone* was heir at law of *James* as well as of *Andrew Bone*.

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IN THE EXCHEQUER CHAMBER.

Crown Case, reserved for the opinion of the Judges.

Monday,
4th February.

The KING, on the Prosecution of FREDERICK WILLIAM, King of *Prussia*, v. GOLDSTEIN.

Forgery.
[*Evidence.*]
To support an indictment charging the forging of foreign negotiable instruments in this country, on the 43 Geo. 3. c. 189. s. 1., it is sufficient to shew that an instrument had been forged here resembling such as, if genuine, pass currently instead of money abroad. The averment necessary in

THE Prisoner had been tried and convicted before Mr. Justice *Richardson* at the last *September* sessions at the *Old Bailey*, on a charge of forgery. The indictment was framed upon the 43d of *Geo. III.* ch. 189. sec. 1.* It consisted of seventy-two counts. The first charged that the prisoner, “falsely

* By which it is enacted, that “if any person, from and after the passing of that act shall, within any part of the United Kingdom of *Great Britain* and *Ireland*, falsely make, forge, or counterfeit, [or cause, &c.] or knowingly aid or assist in the false pleading, and facts necessary to be proved to establish a case of forgery in respect of common *English* negotiable instruments generally, do not apply to instruments within that special statute, the word “purporting” therein applying rather to the object and intention of the maker in putting it into circulation, than to any form of words constituting the instrument.

In an indictment for forgery founded on that statute, it is not only necessary to set out the instrument charged to be forged on the record, in the foreign language in which it may be worded; but there must also be an *English* translation of the instrument, however inefficient and unintelligible such translation might be; or the indictment will be fatally defective for want of it. It cannot be supplied by evidence: and a conviction founded upon it cannot be supported.

For that reason, the judgment upon a conviction of that offence, on evidence, was arrested, and the convict discharged.

“ falsely made, forged, and counterfeited (and caused, &c.) a certain promissory note, in the *German* language, for the payment of money, purporting to be the promissory note for the payment of money of a certain foreign prince, (that is to say) *Frederick William*, King of a certain foreign

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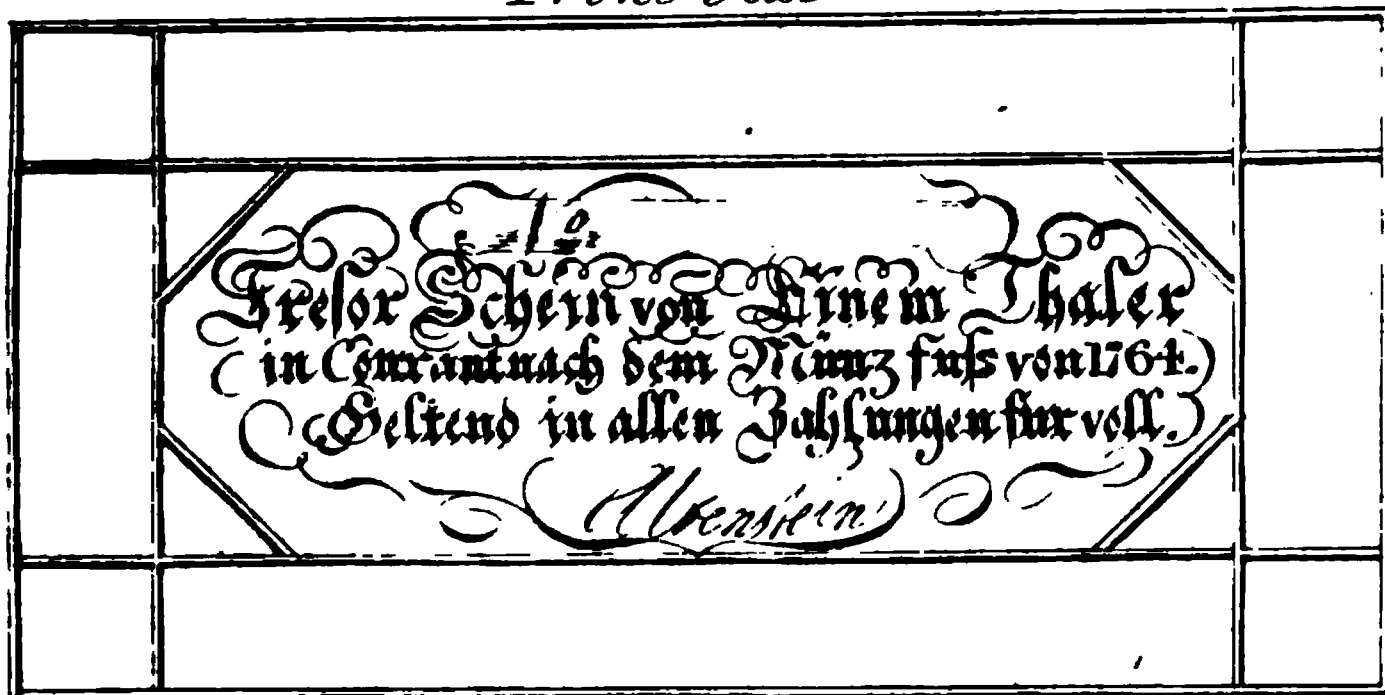
false making, forging, or counterfeiting any bill of exchange, or any promissory note, undertaking, or order for the payment of money purporting to be the bill of exchange, *promissory note, undertaking, or order for the payment of money* of any foreign prince, state, or country whatsoever, or of any minister or officer entrusted by, or employed in the service of any foreign prince, state, or country, or of any person or company of persons resident in any foreign state or country, or of any body corporate and politic, and body in the nature of a body corporate and politic, created or constituted by any foreign prince or state, with intent to deceive or defraud his Majesty, his heirs and successors, or any such foreign prince, state, or country, or with intent to deceive or defraud any person, or company of persons whomsoever, or any body corporate and politic, or body in the nature of a body corporate and politic whatsoever, whether the same be respectively resident, carrying on business, constituted, or being in any part of the United Kingdom, or in any foreign state or country, and whether such bill of exchange, promissory note, or order, be in the *English* language, or in any foreign language or languages, or partly in one and partly in the other; or if any person from and after the passing of this act shall, with in any part of the said United Kingdom, tender in payment or in exchange, or otherwise utter or publish as true, any such false, forged, or counterfeited bill of exchange, promissory note, undertaking, or order, knowing the same to be false, forged, or counterfeited, with intent to deceive, or defraud his Majesty, his heirs and successors, or any foreign prince, state, or country, or any person or company of persons, or any body corporate or politic, or body in the nature of a body politic or corporate as aforesaid, then every person so offending shall be deemed and taken to be guilty of felony, and on being thereof lawfully convicted, shall be transported for any term of years not exceeding fourteen years.”

country

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country called *Prussia*, the tenor of which was as follows, that is to say, (here the note was set out in the *German* language), with intent to deceive and defraud the said *Frederick William*, against the form," &c. The second count was the same as the first, except that it stated the instrument to be the promissory note for the payment of money of ——— *Altenstein*, known by the name and description of *Baron d'Altenstein*, he the said ——— *Altenstein* being a minister entrusted by and employed in the service of the said *Frederick William*, so being such foreign prince as aforesaid, with intent to deceive and defraud the said *Frederick William*. The third count differed only in that it charged the forgery to have been committed with intent to deceive and defraud the said *Altenstein*. In other counts the said ——— *Altenstein* was stated to be "a person resident in a certain foreign country called *Prussia*." And in other counts the intent charged was to deceive and defraud the said ——— *Altenstein*. In another class of counts the instrument was stated to be "an undertaking for the payment of money;" and in another, "an order for the payment of money." The instrument was set out on the record, and in some counts it was stated to be in the *German* language, in others to be partly in *German*, and partly in *French*; and in several the particular language was not averred. There was no count in the indictment setting out an *English* translation of the instruments. The form of the instrument, as exemplified upon the record, was represented after the following manner:

Front Side.

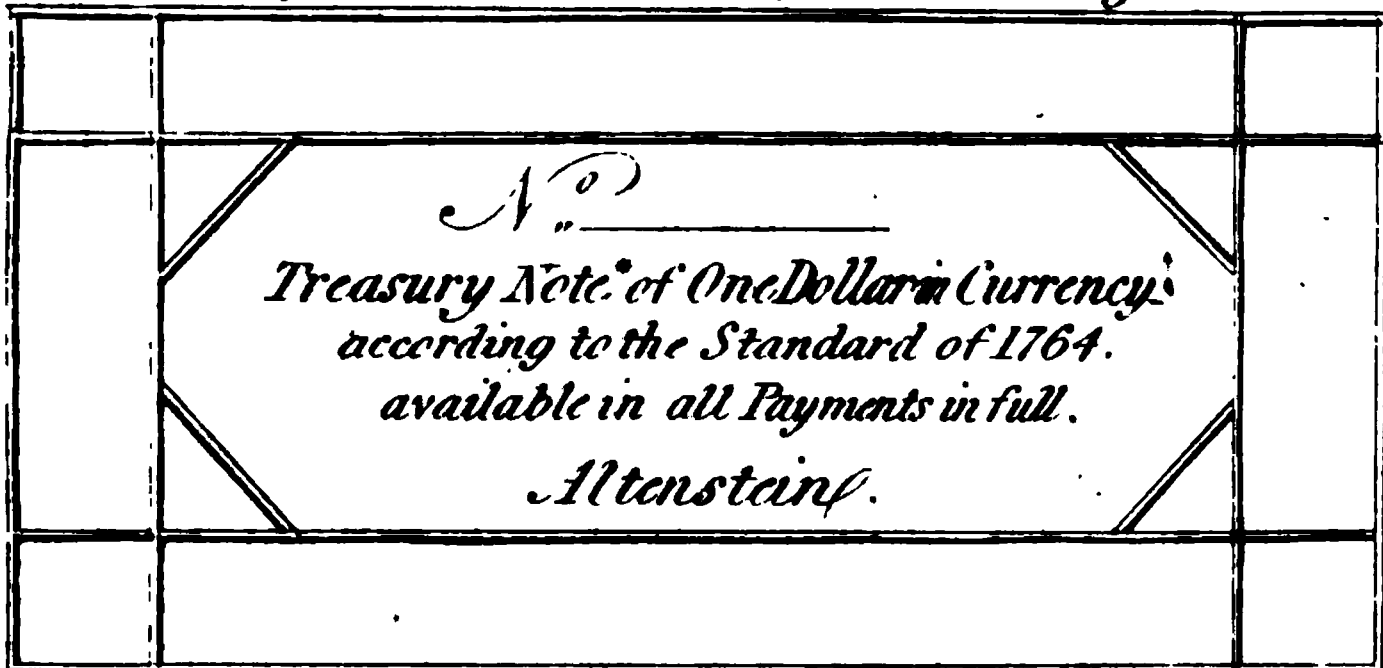


Reverse Side.

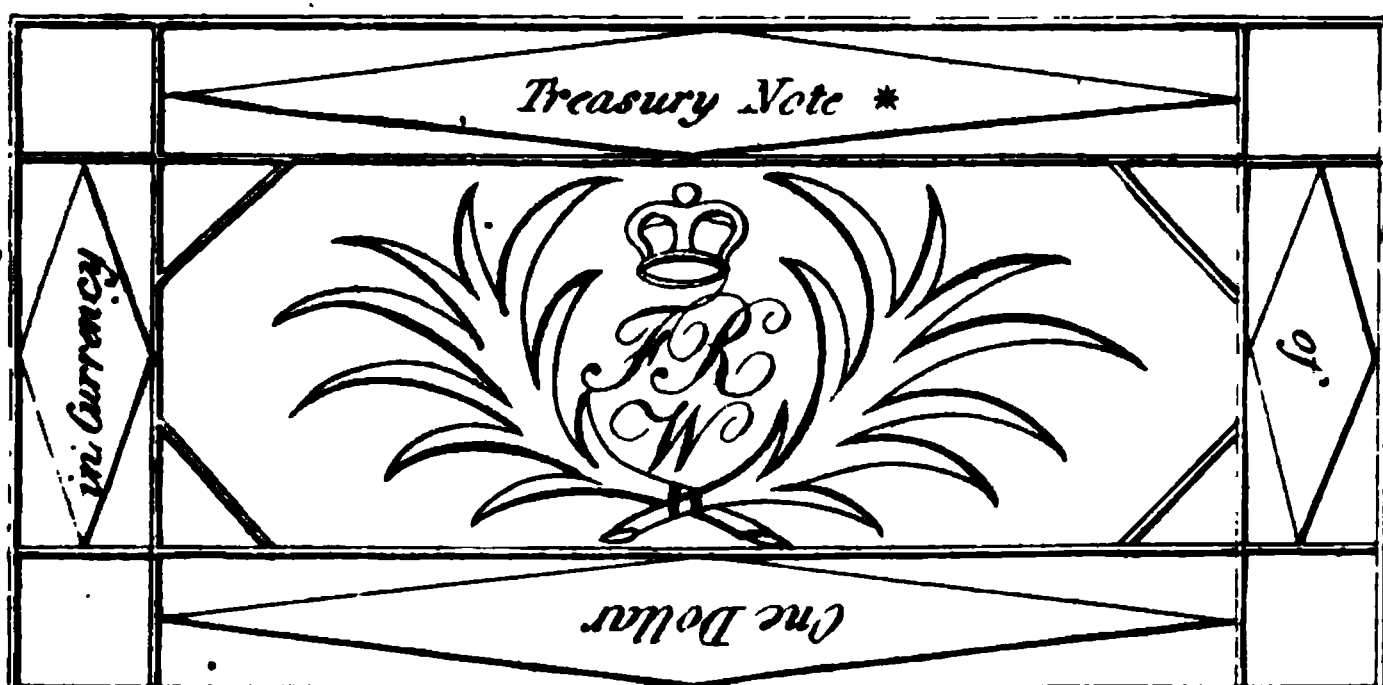


Realisations Comptoir zu Königsberg.

It was Translated by a Witness who acted as an Interpreter as follows, Viz: on the Front Side.



Reverse Side.



Payable at the Office of Realisation at Königsberg.

* or Receipt † Value in English Money Three Shillings.

** This line was printed with Red Ink.

The first witness called was an engraver living in *London*. He proved being employed by the prisoner to engrave the plates of the tickets, which were the subject-matter of this charge, from a specimen produced to him by the prisoner (being a general *Prussian* note for the payment of one dollar). He stated, that when they were finished, he struck off several thousand impressions upon paper furnished by the Prisoner.

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The Inspector of Police at *Berlin* proved, that the tickets produced were false treasury notes or receipts of one dollar each—that in *May* last, several Jews were taken up at *Berlin*, one of whom the witness had brought over to *England*, to give evidence on this prosecution. He also proved that the original note, from which the false ones produced were stated to have been engraved, and of which each was a *fac simile*, was a genuine note, issued by the *Prussian* Treasury, signed by the proper authority; and that such would pass throughout *Prussia* instead of money—that such notes were current as money, and that on presenting them at the treasury offices at *Konigsberg*, *Breslau*, and *Berlin*, the holder would obtain a dollar cash for each of them. An Interpreter, called as a witness, translated all the notes produced, which were all the same, with the exception of the numbers: and he stated that the language was *German*, with the exception of the two words "*Realisations Comptoir*;" but that the word "*Realisations*," though *French*, was used in the *German* language.

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On cross-examination, this witness said, that the word *schein* alone did not mean a promise in the German language ; literally translated, it signified *note or receipt*—that “ promissory note,” rendered into German, would be “ *Schultz Schein*.”

Upon this evidence, which formed the case on the part of the prosecution,

Platt, for the Prisoner, submitted that the charge in the indictment had not been proved ; for that the instrument set out in the various counts of the indictment, neither was, nor purported to be, as it was stated in the various counts to be, or to purport to be, either a promissory note, or an undertaking, or an order to pay money. He urged that it had been decided, that if an instrument was charged to be forged within any particular statute, it must appear upon the face of it to be such an instrument as would be seen at once to be within that statute ; and he cited the cases of *The King* against *Mary Mitchell* (a), *The King v. Jones* (b), *The King v. Clinch* (c), and *The King v. Williams* (d). He also adverted to the cases of *The King v. Hunter* (e), and *The King v. Thompson* (f), as establishing that the most accurate strictness was required in shewing, on a charge of forgery founded upon a statute, that the instrument proved to have

(a) Foster, 119. East. Pl. Cr. 306. S. C.

(b) 1 Leach Cr. Ca. 53. East. Pl. Cr. 941. S. C.

(c) 2 Leach Cro. Ca. 540. East. Pl. Cro. 938.

(d) 2 East. Pl. Cro. 937. 1 Leach Cr. Ca. 114. S. C.

(e) Leach Cro. Ca. 624. East. Pl. Cro. 928. S. C.

(f) 2 Leach Cro. Ca. 632, in notis.

been

been forged, must have been precisely the same instrument as should be charged to have been forged; that it must appear upon the face of it, to be such an instrument, as in an analogous instance, it would not be sufficient to shew that a paper having the effect and operation of a receipt, had been forged, to make out a case of forgery of a receipt, within the 2nd of Geo. II. ch. 25, unless there were proper averments in the indictment to meet the evidence in the particular case, so as to establish the charge intended to be proved: and he cited, for the sake of that analogy, the case of *The King v. Reading* (g), where it was held that the forged acceptance of "Ring," not purporting to be that of "King" charged in the indictment, would not support the charge.

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The learned Judge (*Richardson*), overruled that objection, on the ground, that as the 43d of Geo. III, had been expressly passed to protect *foreign negotiable instruments* from forgery in this country, it would be sufficient to support an indictment under that statute, to prove that a foreign negotiable instrument had been forged here, by shewing the forged instrument to be such an instrument as the statute contemplated, in whatever words or language the instrument might be framed; for that objections founded on the technical formation of such well known instruments as were negotiably used in *England*, could not apply to such instruments as were the especial subject matter of the consideration of the legislature in passing

(g) East, Pl. Cro. 981. Leach Cro. Ca. 672. S. C.

this

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this statute for their protection. His Lordship therefore ruled, that as the evidence had shewn that this was such an instrument, it was within the act: and he intimated an opinion that the word "purporting," as used in the act, with reference to the object and subject matter of it, applied not to the instrument issued, but to the person issuing it, and to the intention of the maker in representing its purport, rather than to the meaning of any words which might be used in the genuine instrument.

The case thereupon was left to the jury, who convicted the Prisoner.

When the convict was afterwards brought up to receive sentence—

It was moved that judgment should be arrested, on the ground that the indictment was insufficient for want of certainty, in that it set out the false instrument in a foreign language, which was not translated in any count in the indictment; and that the omission of translation had not been supplied by the introduction of sufficient averments on the record, so as to form a distinct and certain charge without such translation.

In support of that objection it was urged, that the object of setting out the instrument on the record, in criminal cases of libel and forgery, is, that the Court which tries the offence in the first instance, and a Court of Error in the next, may judge

judge whether the instrument be within the scope of the law, as applicable to the offence, and supports the charge otherwise; for the Court cannot exercise its judgment in that respect in the case of a foreign instrument set out in its original language, not translated nor explained by averments. The case of *Zenobio v. Astell* (*h*) was referred to, where it was determined that an indictment setting out a translation of a foreign libel without the original was insufficient; and it was submitted that the converse of that proposition, as grounded on the same reason, must also be held. The cases of *The King v. Lyon* (*i*), *Lloyd's Case* (*k*), *Gilchrist's Case* (*l*), and *Reading's Case* (*m*) were also cited, to shew that indictments have been held insufficient, because the purport of the instruments, as stated in the indictments, in those cases, was not, in the opinion of the Court, warranted by the tenor of the instruments given in evidence. It was urged, that Prisoners would be deprived of the chance of advantage of such a possible error, by allowing the instruments to be set out only in the foreign language in which they should be couched. Adverting to the statute 4 Geo. II, c. 26, s. 1, which required all legal proceedings to be in the *English* language; that provision was relied on as fortifying the argument, that every thing material must be stated or explained in that language.

The learned Judge (*Richardson*) stated, without

(*h*) 6 Term. Rep. 162.

(*k*) Leach. 608, *notis* 981.

(*i*) Leach. 597. East. P.C. 982, 983.

(*l*) Leach. 657. East. P.C. 982.

(*m*) Leach. 590. East. P.C. 981.

intimating

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intimating any opinion on this point, that he should reserve the consideration of both the objections, for the opinion of his brothers. The judgment being thereupon respited, both points were accordingly now argued before ten * of the judges.

Platt, in support of the objections, contended, first, that the instrument charged in the indictment to have been forged by the Prisoner, was not, nor did it purport to be, nor had it been, or shewn to purport to be, what it was stated on the record to purport to be, proved to be any one of the instruments enumerated expressly in the statute on which the charge was founded. He urged, that to purport to be, must mean to express by words, or to imply from the general tenor of the instrument, that it is what it is said to be. This instrument did not shew by any means of indication that it was even meant to be a bill of exchange, or promissory note, or undertaking, or order for the payment of money. All the counts state, that the instrument purported to be one or the other. What is meant by an instrument purporting to have any given effect, has been determined by various cases, *The King v. Reading* (n), &c. (o). He finally insisted generally on that first point, that

* *Absentibus*, Bayley, J. and Wood, B.

(n) 2 Leach's Crown Law, p. 598, Ca. 590. 2 East. Pl. Cr. 981. S. C. (o) *Vide ante*, p. 92; the cases there cited. There were also cited *The King v. Reeves*,

that the instrument in evidence did not in point of law, as alledged in the indictment, *purport* (consistently with the meaning, which had been given to that term by the Judges, in the cases cited,) to be, or to have the effect, of any one of the instruments specified in the statute: and that in point of fact it had not, in the language in which it was framed, any such effect.

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Upon the second point he insisted, that for want of an English translation of the foreign language, in which the instrument was worded, the indictment was fatally defective, and could not be supported;—that it was a substantial defect in respect of an indispensable requisite, without which the offence charged, and the nature and extent of it, could not be before the Court and jury. The tenor might have been sufficient, if stated in English; but here there is no translation, nor any thing to supply the deficiency, so as to make the charge intelligible to an *English* judge and jury.

In addition to the authorities already mentioned, as cited in support of the motion made on the trial, the counsel now referred to the case of *The King v. Mason* (p), where an indictment for uttering a forged bill of exchange was held to be bad, because it did not set it forth in words and figures.

Reeves, 2 East. P. C. 984; 2 984. S. C.; 2 East. Pl. C. 975; Leach Cr. C. 808; and the Leach, 487; and *The King v. King v. Lockett*, East. P. C. Powell, 2 East. P. C. 976, 1 940: Leach Cr. Ca. 94. The Leach, 177. *King v. Edsall*, 2 Leach Cr. C. (p) 2 East's Pleas of the 262, in *notis*, 2 East. Pl. C. Crown, 975.

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Law, in support of the conviction, insisted that the instrument which was the subject matter of the offence, of which the prisoner had been convicted, was in substance and effect as charged in the indictment,—whatever form of words might be used in framing it, and expressing its purport, object, and intent, which in all such instruments are immaterial,—a promissory note for the payment of money. It had been proved at the trial, that when genuine, the same form of instrument, in the same words, was recognized as such throughout the *Prussian* dominions. In the case of *The King v. Shepherd* (q), *Rex v. Locket* (r), *Willoughby's Case* (s), *Morris v. Lee* (t), it was held that the form of words in which an instrument, for payment of money, recognized as negotiable, be framed, do not give it effect, or invalidate it: *Bayley* on Bills (u). It would not (it was assumed) be contended, that to make this a promissory note within the statute, it must be in the terms and form of an *English* promissory note.

He adverted very particularly to the language and terms of the instrument, to shew that in every part, it purported to be a recognition of a right, on the part of the holder, to demand payment of a definite sum of money, (one dollar) from the *Prussian* Treasury, and a promise and undertaking on the part of the *Prussian* Minister, to

(q) 2 East. P. C. 944. Leach,
265. S. C.

(r) East. P. C. 940. Leach,
110. S. C.

(s) Fast. P. C. 944.

(t) Ld. Raym. 1396. 1 Str.

629. S. C. 8 Mod. 362. S. C.

(u) pp. 1, 3. 3d edit.

pay that sum at the Treasury at *Konigsberg* : all this had been proved on the trial; and that this species of instrument was in common currency, and received, as being known in *Prussia* to be an undertaking for the payment of money, and that from the terms which appeared on either face of it. He insisted that the purport of every instrument was what it professed to be in the terms, and on the face of it; and distinguishing the case of *The King v. Edsall* (*w*), the case of *The King v. Jones*, and *Reading's* and *Gilchrist's* Cases, on the ground, that the instruments did not in fact purport on the face of them, to be what was averred to be the purport of them,—he cited the authority of *Heath* and *Lawrence*, J. J., and *Thomson*, B., in the case of *The King v. Reeves* (*x*), where those judges held, that a scrip receipt “*C. Olier*,” was well laid, as purporting to be signed by *Christopher Olier*, inasmuch as the indictment was not on the face of it repugnant to the bill, or inconsistent with itself; and the fact alledged might be and was verified and sufficiently explained by evidence to be left to the jury. So in *Elliott's* Case (*y*), it was left to the jury whether the word “fifty” meant fifty pounds. It was also submitted, that the authorities adverted to on the part of the Prisoner, on the construction of the 17th of *Geo. II*, ch. 22 (*z*), did not apply to the objection now made to this indictment.

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(*w*) East. P. C. 984.

(*z*) *Mary Mitchell's* case, *The*

(*x*) East. P. C. 984. 2 Leach 933. *King v. Williams*, and *Clink's* case, *ubi supra*.

(*y*) 1 Leach, Cr. Ca. 110.

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[The Court interposed in this part of the argument, expressing themselves to be satisfied that the instrument was clearly one of those in respect of which, the offence of forgery being committed, it would be within the statute upon which this indictment proceeded. It was therefore intimated, that the argument should be confined to the objection that no translation of the instrument had been put upon the record.]

That there should be a translation of the instrument in such a case as this in the indictment, it was then contended, was not necessary, upon the reason and principle of the thing. As to the necessity contended for of a translation into *English*, in order that the Court might be enabled to judge whether, upon the face of it, it was an instrument within the provisions of the statute or not: or that it must be verbally explained, in order to be understood—it was answered that it was not only unnecessary for that purpose, inasmuch as that object would be much better and more effectually attained by parol evidence; but in a case of this sort, a translation would not give any more information to an *English* Court than the original document furnished, as a literal translation would be to them as unintelligible in *English* as the original document in the foreign language; because the *English* terms, into which the words would be rendered, would not supply the tenor of the instrument, as understood in *Prussia*. Some of the words used may also be incapable of translation. Parts of this document, such as the figured engravings and cyphers which appear
on

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on the face of the ticket, are incapable of translation, and can only be supplied by *fac similia*, or by evidence:—amongst the former are the crown and wreath, and lines; and the letters, ‘F. W. R.’ are of the latter nature. A translation also, may not only be defective, but might convey a different, or false, or contradictory notion of the nature and effect, or purport of the instrument, and rather pervert and mislead than assist or direct; whereas all such symbolical devices and untranslatable terms are familiar to the eye in the country where these notes are commonly current and negotiable, and convey to a *Prussian* subject an idea and consciousness of the presence of money, or a representation of value which he only may be able to understand or to explain. As an instance of the mischief of a translation, the case was put of a *French* bill of exchange, worded precisely as an *English* bill should be, literally translated. By the law of *France*, such instruments must not only express on the face of them that value has been received generally, but must also state in what that value consisted, whether in money, or goods &c. The Courts in this country would consider it to be valid, although, in truth, it would be a mere nullity; and that might be supplied in answer to an action upon it, by evidence. The purport of this instrument also can only be gathered by evidence of its nature and effect in the country where it is acknowledged, and nothing intelligible can be collected from the useless and idle formality of a literal translation. In this case the charge is made complete by the averments put on the record, to bring

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bring the document within the statute. The nature of the instrument, and the form which is considered necessary to it as a valid order or undertaking for the payment of money, is proved by the evidence; and this is shewn to be a *fac simile*, falsely made here, to represent a valid promissory note for payment of money, available and current in *Prussia*, where it was intended to be circulated, on the authority of the King. A translation would rather injure than assist the laying the charge, by rendering it more imperfect; and therefore it was that a translation was unnecessary, and at least useless, if not improper.

It was then contended, that it had been determined to be unnecessary by the authority of decided cases. Distinguishing the case of *Zenobio v. Axtell*, which merely established, not that a translation into *English*, of a libel in a foreign language, was necessary; but that the libel must be set forth in the original language; it was therefore submitted to be an authority in favour of this indictment, because the tenor of the instrument has been set out in the tongue in which it was written; and that is to avoid the evils and mischiefs of a translation, as already shewn. Libel, too, is only slander reduced into writing; and the authorities collected by Mr. Serjt. *Williams*, in his note to *Craft v. Baite*: (a), that translations in libels are unnecessary, proceed on the principle of the greater safety and accuracy

(a) 1 Wms. Saund. 242.

of such a course. Two anonymous cases from *Hobart* (b), and *Gibbs v. Jenkins* (c), were also cited, where it was held, that a declaration in an action for words spoken in *Welsh*, must set out the meaning in *English*.

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Platt, in reply, professed to limit his argument to the verbal part of the instrument—such parts as might have been translated, or were capable of a proper construction by the introduction of necessary averments in the indictment. He distinguished the cases in *Hobart*, as applying only to native dialects, or languages spoken by subjects of, and living in, this country, so that they did not apply. On the whole, he submitted that this indictment, and the conviction, could not be supported.

Cur adv. vult.

Eight of the ten Judges present at the argument, were of opinion that the indictment was bad, not having a translation of the instrument, in respect of which the charge was made; and as the prosecutor did not prefer a fresh indictment, the prisoner was discharged at the last Sittings at the Sessions House in the *Old Bailey*.

(b) Hob. 126, 169.

(c) Hob. 191.

Ex

1822.

Wednesday,
6th February.

On an application on the part of Bail for enlarging the time for rendering their principal confined in a county gaol, under sentence of the Court of King's Bench, until eight days after the expiration of the time for which he was sentenced to be imprisoned (one year), the Court granted a rule to shew cause, which they afterwards made absolute without costs.

Ex parte the Defendant's BAIL, in a Cause of
ROUCH and another *v.* BOUCHER.

A RULE had been obtained on the first day of this Term, calling on the Plaintiff in this case to shew cause why the time for surrendering the Defendant in discharge of his bail in this action, should not be enlarged until eight days after the expiration of the time for which he was imprisoned, pursuant to his sentence by the Court of *King's Bench*: or why an *exoneretur* should not be entered on the bail-piece, and that in the mean time all further proceedings against the bail should be stayed.

The application was founded on an affidavit made by one of the bail, and sworn on the 21st of *January* instant, stating that he and another person became bail for the Defendant, who had been arrested on a writ of *quo minus*, returnable from *Easter-day* last, in one month then next coming, at the suit of the said Plaintiffs, for a debt of 80*l.*; —that the Defendant had been since that time indicted with others for a riot and assault upon certain excise officers in *Cheltenham*, and at the last assizes for the county of *Gloucester* was found guilty;— that in *Michaelmas* Term last he was brought up for judgment in his Majesty's Court of *King's Bench*, and received a sentence of one year's imprisonment in the Gaol or House of Correction at *Northleach*,

Northleach, in the county of *Gloucester*, and to find sureties, at the expiration of that term, for his good behaviour;—that the Defendant was then in custody of the gaoler or keeper of the said gaol at *Northleach* aforesaid, under the above sentence. The deponent then stated, that he had heard and believed it to be true, that the Plaintiffs had obtained final judgment in this action against the Defendant, and had issued a *capias ad satisfaciendum*, in order to ground proceedings on the recognizance of bail, and that the deponent was desirous of surrendering the Defendant in discharge of his bail in this action; but that he was unable to do so by reason of his confinement in the said gaol or prison, under the sentence aforesaid. A verified copy of the Defendant's commitment in pursuance of his sentence, and a certificate of the Keeper of the House of Correction at *Northleach*, were subjoined to the affidavit.

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Richards, R., who made the motion, cited in support of it, the case of *Hodgson v. Temple (a)*.

Jones, D. F., now shewed cause, upon an affidavit, stating that the Defendant had brought a writ of error for delay, and stating the dates of the different proceedings; from which he contended that the bail were now fixed, and could not ask this extraordinary indulgence of the Court. To exonerate the bail, he submitted, was quite out of the question, as there was no pretence for that part of the

(a) 5 Taunt. 503. 1 Marsh. 106..

application,

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application, under the circumstances. The other alternative, he intimated, if it should be granted, would in effect be tantamount to a complete exoneration. He also submitted, that in the Court of *King's Bench*, the course was not to enlarge the time for the render of the bail, but to bring up the Defendant by *habeas corpus*, to be rendered regularly in discharge of his bail, citing *Sharpe v. Sheriff* (b), and *Merrick v. Vaucher* (c), in which last case the application in ease of the bail was refused, because the affidavit upon which it was founded did not negative the facts of the bail having effects of the Defendant in their hands, and that they were not indemnified. He urged therefore, that it was contrary to the practice and the rules laid down by the Court of *King's Bench*, to grant the present application; and that, as no instance had been cited as a precedent in this Court for so strange a measure as was now sought, this Court would hold themselves bound by the practice of the other Courts.

Richards, about to support the rule, was stopped by the Court.

RICHARDS, *Lord Chief Baron*.—Whoever expects that the discretion of this Court will be considered under the control of what is said to be the practice of any other Court in *Westminster Hall*, in granting or refusing any application which is wholly discretionary, will find themselves much

(b) 7 Term. Rep. 226.

(c) 6 Term. Rep. 60.

mistaken,

mistaken, so long as I have the honour of a seat here, and a voice in such matters.

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and another
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I consider the application in the present instance, addressed as it is to the discretion of the Court, as one that we ought to grant, more particularly as there has been no reason offered against the motion, either as matter of principle or convenience. The application not being such as can be shewn to be unreasonable, the opposing party is driven to the argument—as the only thing that can be said against our granting a reasonable motion, in aid of persons who require it to ease them of a difficulty which has come on them without fault on their part—that it is not consistent with the practice of another Court, to do that which is asked of us, and against which nothing else can be urged. And why is it not the practice of the Court of *King's Bench* to do this, in the way in which we are called on to interfere?—Merely because it is the practice of that Court to do the same thing in another manner, more formally, perhaps, but less to the advantage of the Plaintiff in the cause. It would, no doubt, be a desirable thing for the Plaintiff to fix these bail with the debt and costs; but we think that that is what he ought not to be permitted to do, and to prevent it we will enlarge the time for making the render. We will therefore make the first part of this rule absolute, without costs.

GRAHAM, *Baron*.—I concur with my Lord Chief Baron, in thinking this a reasonable application, and that it ought to be granted.

WOOD,

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ROUCH
and another
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WOOD, Baron.—I think so too. There can be no injury done to the Plaintiff. The question is merely, as to what custody the Defendant is to be in for the present.

GARROW, Baron.—The bail propose to give you all you want, or could have—the custody of the Defendant when his present term of imprisonment shall be expired. As soon as the prison at *North-leach* is about to be opened for the egress of this Defendant, they have only to attend at the door to receive their principal, and hand him over to you: It is an application which really ought not to be opposed.

**Rule absolute—for enlarging
the time for rendering the
Defendant—**

[without Costs].

IN THE EXCHEQUER CHAMBER.

1822.

Coram RICHARDS, LORD CHIEF BARON.

T. COOD *v.* M. B. COOD, and POLLARD *.

Wednesday,
7th February.

[Rehearing.]

THIS case having been argued a second time before the Lord Chief Baron, his Lordship now gave judgment as follows :—

I am certainly under an inveterate mistake if I am wrong now ; for I cannot, after all that I have heard, depart from the opinion which I had formed before, when I first heard this cause, and I then gave it the fullest consideration. I have since re-considered it with all the attention I am capable of giving to it.

The question in this case is wholly between

* *Vide ante*, vol. 9. p. 544. where the pleadings, facts, and points of this case are already stated, with the arguments and authorities, and the original judgment of the Court.

Cood

for what remains due to him, as would defeat, or as should be preferred to that of the mortgage.

Quere ? how far, and in what cases, taking security for payment of purchase money is a waiver by Vendor of his lien on the purchase money upon a subsequent sale by the Vendee.

A party who, having lent money to enable a Vendee of property sold, to pay the Vendor part of the consideration for the purchase, a bond with sureties being executed to him for the remainder, takes a security for repayment by assignment of the subject matter, with the privity and knowledge of the Vendor, the whole matter being recited in the original deed:—held, that on a second sale by the Vendee to satisfy all demands, the original Vendor had not such a lien on the purchase money,

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T. COOD

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and
POLLARD.

Cood and Pollard. There is no other person interested in it; and if I were not sure that there was no objection here for want of parties, I could not go on.

[His Lordship then stated the circumstances of the case.]

Pollard lent his money to be applied in part payment of the purchase-money agreed to be paid for the property by the vendee. Other parties also executed a bond for securing to the vendor the remainder by installments.

If the question in this case had been between the obligor in the bond given to *Cood*, the vendor, it might have been a different thing.

The Plaintiff contends that he has a right to be paid what remains due to him on the original purchase, out of the purchase-money on the second sale; urging, that the money is the produce of his property, and insisting on a lien, upon the authority of the case of *Mackreth v. Symmons* (a).

The question in this case is in truth, not whether the Plaintiff has a lien on the purchase-money as against the original purchaser, the second vendor, but whether he has a lien on it as against *Pollard*. That question depends (in my view of it) altogether on the deed of assignment, and the true construction and effect of it. That the vendor

(a) 15 Ves. 329.

of an estate has, generally speaking, a lien on the purchase-money to be paid on a sale by the vendee, for what he has not received of the original consideration stipulated to be paid to him, there can be no doubt; and that doctrine is certainly fully settled by the case I have mentioned; but that authority is founded on facts which make it very distinguishable from this case. The facts before the Court raise these two questions:—first, whether the lien of the Defendant as a mortgagee, under the particular circumstances of this case, is to be defeated by that of the original vendor. And, secondly, whether his privity with that mortgage, and also his taking collateral security from the vendee by the bond of other persons, do not amount to a waiver of his lien. Upon the second point, the waiver by taking security, there is this material difference in the facts between this case, and those in *Mackreth v. Symmons*. There the bond was taken by the original seller of the estate from the purchaser alone: here he took a bond with sureties. Now I know (for I was of counsel in the cause of *Mackreth v. Symmons*, and well remember the case) that the Lord Chancellor had very great doubt on that part of the case, and that he considered the question of waiver by taking security, one of considerable difficulty. Very long experience in the Court of Chancery has taught me the value of the Lord Chancellor's doubts on all occasions. His great anxiety on every subject of difficulty urges him to give each case the fullest consideration. I know also that it was his intention to have required the assistance of Mr. Baron

Thomson

1822.

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and
POLLARD.

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and
POLLARD.

Thomson, but the question upon that point never came on again—probably, because the Chancellor was disposed to decide the other point in that case in favour of the vendor; but that question, certainly, never was so decided.

[His Lordship stated the terms of the deed of assignment.]

The whole transaction was matter of arrangement between all the parties, and is recited in the very deed which *Cood* himself executed. The effect of it is, that *Cood* gives authority to *Foster*, the vendee, to mortgage the property to *Pollard*, and the other person. Now, when I see the seller acting in such a way, agreeing to the transaction, and empowering the vendee to do this, and even, as it were, directing it, or at least assenting to it, can I say that he has still such a lien as would operate to defeat his own acts? These circumstances differ this case altogether from that of *Mackreth v. Symmons*, and render it totally inapplicable to the present question.

I have given this case, in consequence of the importance which has been attached to the question, it being considered to be governed by the doctrine and decision in the authority so often alluded to, of *Mackreth v. Symmons*, the fullest consideration, and all the attention and care that I am capable of bestowing; and I do not find the least reason for altering my former opinion. The decree must therefore be affirmed.

Bill dismissed.

RUMNEY

RUMNEY v. BEALE and others.

1822.

[By original and amended Bill, and Bill of Revivor.]

Tuesday,
8th February.

MARTIN moved that *Richard Richards, Esq.* one of the Masters of this Court, might be directed, in his certificate of the taxation of the several parties' costs, now under taxation in pursuance of the decree made on the hearing of the said first mentioned cause, dated 7th November, 1817, to deduct the amount of the costs of the said Defendants which should be taxed, from the amount of the Plaintiff's costs which should be taxed.

The Court refused a motion for special direction to the Master, requiring him to deduct in his taxation of the costs of the parties, the costs which he should allow to the Defendant from those which he should allow to the Plaintiff (who had become insolvent) after the decree had been passed and acted upon.

It appeared that the suit had been instituted for an account of tithes; and by decree Nov. 7, 1817, it was referred to the Deputy Remembrancer to take an account of milk, honey and wax, *Easter* offerings, and agistment, and the value of the tithe thereof. The Deputy Remembrancer was to tax the Plaintiff's costs in respect of the several matters which were the subject of the said accounts, and Defendants were to pay to the Plaintiff, or his Clerk in Court, the said costs, when taxed; and it was further ordered, that the Plaintiff's bill, in regard to all other matters, should be dismissed with costs, to be taxed for the Defendants, and that the same, when taxed, should be paid by Plaintiff to Defendants.

But they refused the application, without costs.

1822

RUMNEY

BEALE
and others.

The Plaintiff afterwards became insolvent. His assignees filed a supplemental bill in *Trinity* Term 1821; and the Defendant having agreed to pay 11*l.* for the value of the tithes of which an account was directed, the account was waved, and the parties proceeded to tax their costs.

The Plaintiff's costs amounted to above 300*l.*, and the Defendants' (which they now wanted to set off against the Plaintiff's) to about 60*l.*

Sclater opposed the motion, on the ground that no such set-off had been directed by the decree, and that the application should have been made before the decree was passed and acted upon; and that the Defendants came too late. He also urged, that it would be a great hardship on the Plaintiff's Solicitor, who had advanced the Plaintiff's costs.

Per Curiam,

Motion refused, but without Costs.

GENERAL ORDER

1822.

Saturday,
10th February.

Touching the Apposals of the Sheriffs upon the Summons of the Green Wax.

WHEREAS upon apposals of Sheriffs for the several counties, cities, and towns in *England*, upon the

1822.

the process of this Court issued out to them for the levying recognizances forfeited and estreated into this Court, as well from the assizes as from the several and respective sessions of the peace* held in and for such cities, counties, and towns, the said Sheriffs do seldom or never take any of the said debts in charge, but do frequently *nihil* the same, upon pretence that they cannot levy the same, by reason of the insufficiency of the persons, both principals and sureties, therein bound, alleging that many of them cannot be found as they are mentioned in the recognizances, and that others of them are so poor and unable that they are maintained by the parish, or otherwise utterly incapacitated to answer or satisfy their said recognizances, or any just compositions to be made thereupon, and that they are so uncertainly described in the said recognizances that no levies can be made thereon; whereby the process of this Court is rendered ineffectual for recovering the forfeitures and penalties of such their said recognizances, or any fitting or just compositions or satisfactions for the same. In consequence whereof the justice of the nation for the punishment of criminals and offenders is very much obstructed, as well as his Majesty's revenue. It is THEREFORE the opinion and direction of this Court, that the several Clerks of Assize and Justices of the Peace for the several and respective circuits, cities, towns, and counties within the kingdom of *England*, do take care for the future that

* Since the 3d of Geo. IV. ch. 46, this order is not applicable to the Quarter Sessions, or to Clerks of the Peace.

1822.

good and sufficient persons to answer the ends of their respective recognizances be henceforth had and taken. And it is hereby ORDERED, that for the better and more effectual observance and execution of this order, all and every Clerk and Clerks of Assize and of the Peace, and Town Clerks, and their respective Deputy or Deputies, within the kingdom of *England*, do carefully observe and perform the same in all respects, as far as they are or may be concerned therein, and do give immediate and effectual notice thereof to all Justices of the Peace and other persons concerned in the taking of any recognizances, that they take sufficient security in the premises, with certain descriptions of the persons, and their respective habitations and places of residence, and publish this order in their respective assizes and sessions of the peace, and otherwise, so that obedience may be given thereunto. And the Surveyor General of the Green Wax of this Court is hereby required from time to time, as occasion shall require, to see this order sent out with the process of this Court which issues to levy forfeited and estreated recognizances; and the several Sheriffs to whom such process is or shall be respectively directed, are hereby enjoined to deliver the order, or a true copy thereof, to the respective Clerks of Assize, Clerks of the Peace, and Town Clerks, for their respective circuits, cities, towns, and counties, or their respective Deputies, in order to have the same observed as hereinbefore is directed and required.

END OF HILARY TERM.

SITTINGS

AFTER

HILARY TERM,

3 GEO. IV.

GRAY'S INN HALL.

NEWHAM v. MAY.

1822.

Friday,
22d February.

MOORE, moved that the answer which had been filed to the amendments in the Plaintiff's bill in this cause, might be ordered to be taken off the file, as being a mere evasion, and not an answer.

An answer to amendments, consisting only of a denial of a statement in the bill, which the Defendant had already in effect answered in his first answer, ordered (on motion) to be taken off the file.

Many material amendments had been made in the bill, and the Defendant's further answer consisted wholly in the denial of one single fact stated in the bill, and which he had in effect, answered in his first answer. The further answer, which was the object of this motion, was not filed till after the second or peremptory order for time had expired, and notice had been given of a motion for an attachment.

Under these circumstances it was urged, that
the

1822.

NEWHAM

MAY.

the Plaintiff ought not to be put to exceptions, but that the evasive answer should be taken off the file ; and the cases of *Tomkin v. Letbridge (a)*, *Smith v. Serle (b)*, were cited, to shew that such an order had been made in similar cases, upon a summary application by motion.

Wakefield opposed the motion.

The *Lord Chief Baron* having taken time to consider the application, now made the order prayed.

Ordered.

(a) 9 Ves. 178.

(b) 14 Ves. 415.

1822.

Coram RICHARDS, LORD CHIEF BARON.

PULLEY, Clerk, v. HILTON and others.

Friday,
22d February.

Where the Defendants, occupiers of land, in respect of which a suit had been instituted against

AN issue had been directed in this suit for tithes, which had been instituted by a Vicar against Occupiers

them for tithes, set up a defence of title to the tithes in their landlord, and produced in evidence on the hearing of the cause certain deeds belonging to their landlord, the Court made an order, on an application by petition, that the Defendants should produce such deeds on the trial of an issue granted, or that they should upon the trial admit the fact, which it was alleged the deeds would establish, although the deeds belonged to their landlord, who was not a party to the suit.

cupiers of Land, to try the right to the small tithes.

1822.

PULLEY,
Clerk,v.
HILTON
and others.

The Plaintiff now, *by petition*, prayed the Court that either the said Defendants should produce or *procure the production of certain title deeds*, produced by them at the hearing of this cause, to be produced on the trial of the issue, or that they should admit upon the trial that their farms and lands were the land the jointure of Dame *Rolt*.

The petition stated the nature of the suit, and the result. The Defendants had by their answer set up a title to the tithes in their landlord, the Duke of *Bedford*. The petition also stated, that certain deeds (which it enumerated and described specifically) *had been produced at the hearing of the cause*, to shew that the farms and lands in the occupation of the Defendants, in respect of which the tithes were sought, had been settled upon Dame *Rolt*, for her jointure, which, with the tithes thereof, had become the property of the Duke of *Bedford*;—that, in order to rebut such evidence, the Petitioner produced the proceedings in a cause, wherein *R. Taylor*, the owner of the impropriate rectory of *Clapham*, was Plaintiff, and the said Dame *Rolt*, Defendant, claiming the small tithes of 300 acres of pasture land, the jointure of the said Dame *Rolt*, who, by her answer, alleged that the small tithes of those lands did not belong to the Rector, but to the Vicar of the said parish of *Clapham*; and the bill was dismissed.

The

1822.

PULLEY,
Clerk,
v.
HILTON
and others.

The petition further stated, that the Petitioner believed that the Defendants' farms and lands were the same land, the tithes whereof were in dispute in that cause, as appeared from the said deeds;— that the Petitioner took out the usual warrant for the Defendants to produce, and leave with the Master, all exhibits, books, papers, and writings, belonging to or in anywise relating to the matters in question in this cause, in their custody, possession, or power, according to the decree made in the cause, under the authority of which he had urged before the Master, that the Defendants ought to be ordered to produce the said deeds; but the Defendants' Solicitor having contended that, as the deeds belonged to the Duke of *Bedford*, and were not in the custody, power, or possession of the Defendants, they ought not to be ordered to produce them, the Master had accordingly refused to make any such order.

The petition concluded with stating, that the Solicitor of the Defendants was also the Solicitor of the Duke of *Bedford*, at whose expence the present suit was defended; and that, although the Petitioner had served the Duke of *Bedford* with a *subpoena duces tecum* to appear and produce the deeds upon the trial of the issue, yet, having been advised that he could not compel such appearance and production, and that it was material to him, in support of his case, to prove the fact: therefore the Petitioner prayed, &c.

The

The facts stated in the petition were verified by affidavit.

1822.

PULLEY,
Clerk,v.
HILTON
and others.

Jervis and *Boteler* appeared for the Petitioner, in support of the prayer of the petition. They insisted, that as the deeds now sought to be produced had been given in evidence at the hearing of the cause on the part of the Defendants, they ought to produce them also upon the trial;—that there could be no doubt that they were still in the possession of the Duke of *Bedford*, or if they were not, that should be stated by affidavit, which had not been done.

Callen, opposing the application, submitted, that the Duke of *Bedford*, not being a party to this suit, ought not to be called on to produce these deeds, which were not in fact, by the Plaintiff's own shewing, in the custody, possession, or power of the Defendants, and therefore could not be produced by them.

Reply was dispensed with.

RICHARDS, *Lord Chief Baron*, having stated the application in the prayer of the petition.—This application, as now made, may be granted in the alternative, although an absolute order on the Defendants to produce or procure the production of what was not in their possession, was necessarily refused, because a party ought not to be placed in a situation to be imprisoned for life for not doing what it might not be in his power to do. That difficulty

1828.
 PULLEY,
 Clerk,
 v.
 HALTON
 and others.

difficulty is obviated by the terms of this application, and I have no hesitation in making the order prayed. There can be no doubt that the real question in this suit is between the Plaintiff and the Duke of Bedford; and as the affidavit made in support of this petition is not contradicted, I may take it for granted that the deeds sought to be produced are in the possession of the Duke. They were read here on the hearing of this suit, and the Court made an order upon the hearing, that all exhibits, deeds, books, &c. in the custody, possession, or power of the parties, should be produced and left with the Master. Now, their having been read here on the part of the Defendants, affords reason to think, that the production of the deeds is in the power of the parties, though they may be in the possession of the Duke of Bedford. The course adopted by the Lord Chancellor, I know, is,—where documents and other evidence have been produced and read at the hearing of the cause by either party, which he afterwards refuses to produce on the trial in evidence for the opposite side—to grant a new trial *toties quoties*. I remember in a case of an issue which was tried before me at Lancaster, where one of the parties refused to produce a piece of evidence which had been used before the Chancellor, I told them that the consequence of refusing to bring it forward would certainly be a new trial. It was then produced, and the cause proceeded. So in this case, if these deeds should not be produced before the Jury when called for at the trial, I should certainly order a new trial upon that ground; because nothing

is

is more clear than that the Jury ought to have before them all the evidence which induced me to grant the issue; and I would order a new trial as often as the parties should not chuse to produce these deeds, which, in honesty, I think them bound to do.

1022.
 PULLER,
 Clerk,
 HILTON
 and others.

I certainly would make an order on them now to produce the deeds, if it could be shewn that the Defendants had them in their possession. As it is, I will give an order for their production, or that they shall admit on the trial that the farm and land were the subject-matter of the jointure in the deeds produced in the old suit. The petitioner may therefore take the order in that way, both for the production of the deeds on the trial and before the Master.

The Lord Chief Baron afterwards directed that there should be entered in the minute book (in terms) the following

ORDER.

That the Defendants do produce before the Master on or before the first day of *May* next, and at the trial of the issue directed in this cause, the title-deeds mentioned in this petition; or that they admit upon the trial of

1822.

PULLEY,
Clerk,v.
HILTON
and others.

of the said issue, that their farms and lands are the land the jointure of Dame *Rolt*, the tithes whereof were in dispute in the cause of *Taylor v. Rolt*.

1822.

Wednesday,
27th February.

GARLICK v. BALLINGER.

Where the Defendant had applied to the Court for the Relief of Insolvent Debtors for his discharge generally, and that Court remanded him for a certain period, this Court refused a motion for a writ of *supersedeas* to discharge him as to the action, made on the ground that the Plaintiff had not delivered a declaration to the Defendant, or at the gaol, within two terms after the return of process, because they considered that the circumstances afforded sufficient cause why they should not grant the application.

A RULE had been obtained by *Cooke* in the last Term, calling on the Plaintiff to shew cause why a writ of *supersedeas* should not be issued out of this Court, directed to the Sheriff of the county of *Gloucester*, commanding him to discharge out of his custody the Defendant, who had been arrested, and was in prison there at the suit of the Plaintiff, on the ground that the Plaintiff had not delivered a declaration in this action to the Defendant, or at the gaol, before the end of the next Term after the return of the process, pursuant to the rule of Court *.

Richards

* Which directs, " That in all cases where a prisoner is or shall be taken, detained, or charged in custody, by mesne process issuing out of this Court, and the plaintiff shall not cause a declaration against such prisoner to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison where such prisoner is or shall be detained or charged in custody, before the end of the next term after the return of the process, By virtue whereof such prisoner is or shall be taken, detained, and charged in custody; and cause an affidavit to be made and filed in the Office of Pleas of this Court, of the delivery of such declaration, of the time when and person to whom the same was

Richards now shewed cause, upon an affidavit, stating that the Defendant had petitioned to be discharged under the Insolvent Debtors' Act, inserting the Plaintiff's demand in his schedule as a debt due to him; when the Court ordered him to be remanded, and to remain in custody on account of this suit, for a limited period, which would not expire before *October* next.

1822.
GARLICK
v.
BALLINGER

He therefore submitted that the Plaintiff was not compellable to proceed further after that, which would only be putting himself to an useless expence, and subjecting himself perhaps, under the Insolvent Act, to double costs; because the Defendant, although not in fact discharged, might plead to the action the order for his discharge.

Cooke, in support of the rule, relied upon the terms of the rule of Court: and he cited the case of *Nicholls v. Neilson (a)*, as an authority in point. He submitted that the order of the Court, for continuing the Defendant's imprisonment, was not peremptory, but only conditional.

RICHARDS, Chief Baron.—It cannot be asserted that this Court is bound implicitly to observe

was delivered, by the first day of the next term after the delivery of such declaration, the prisoner shall be discharged out of custody, by virtue of a *supersedeas* to be granted by this Court, or one of the Barons thereof, upon entering an appearance, *unless upon notice given to the plaintiff's attorney, or clerk in court, good cause be shewn to the contrary.*"—*Edmund's Practice of the Office of Pleas in the Exchequer*, p. 180.

(a) 6 Taunt. 493. 2 Marsh. 200, S. C.

1832.
 GARLICK
 v.
 DALLINGER.

obedience to its own rules of practice, founded on convenience, where they would evidently work manifest injustice. In this case the Defendant is now in custody, not only at the suit of the Plaintiff in the action, but also under an order of a Court of competent authority, in respect of a matter arising out of that action, and whose jurisdiction, as applied to the subject-matter, is not inferior to ours. That order is equivalent to a sentence. Which order is the Gaoler to obey, if we should direct a *supersedeas*? Without entering into the argument which has been pressed upon us, as a general proposition I may say, that under the circumstances of this case, we ought not to grant this application. *Prima facie*, certainly, the Defendant is entitled to be discharged; but when we are apprised of the true state of things, it is plain that what is asked of us cannot be done, without defeating (if our writ should have any operation) the order pronounced by the Insolvent Debtors' Court.

GRAHAM, *Baron*.—I am of opinion that it is impossible for us to grant this application. There are several insurmountable difficulties. The order we should make would be nugatory, or it would clash with the judgment of another Court, over whose proceedings we have no control. It would be putting the keeper of the gaol at *Gloucester* in a very awkward predicament, obliging him to elect between two inconsistent orders. We must take notice of the order of the Court for the Relief of Insolvent Debtors. Surely that is sufficient cause

to shew against the order now asked of us, why the Prisoner should not be discharged. Our rules are not so inflexible as to be peremptory in all cases, even if in the present instance it was in strictness applicable. In this case, a *supersedeas* would be absolutely nugatory, because the order of the Court for the Relief of Insolvent Debtors is in the nature of a sentence, to be endured by the party. There is no doubt, therefore, that we ought to refuse the application.

1832.

 GARLICK
 OF
 BALEINGOR.

Wood, *Baron*. I am entirely of the same opinion. The first ground taken by my Lord Chief Baron is quite conclusive against this application.

Our rule is only conditional, "unless upon notice given to the Plaintiff's Attorney, or Clerk in Court, good cause be shewn to the contrary." Now the Prisoner in his petition to the Insolvent Debtors' Court, must have put the Plaintiff's demand against him, in his schedule. What occasion was there then for declaring or taking any further proceeding to obtain judgment, where the debt was admitted. His course in that case would be to come in with the Defendant's other creditors, without putting himself to further expence. What can be said to be good cause for not proceeding to declare, if that be not?

We should be acting unjustly towards the Prisoner's other creditors if we were to discharge him, so as to enable him to get away, leaving nothing to pay his debts, which the sentence of the Insolvent Debtors'

1822.

GARLICK
BALLINGER.

Debtors' Court may yet compel him to compromise. I am clearly of opinion that we ought not to grant this application.

GARROW, *Baron*. When this application was originally made before me, I referred the parties to the Court, in order that the question, which I considered an important one, might be fully discussed, and conclusively determined. I am glad that it has been discussed, and fully concur in the result.

In this case, the Defendant made his election to apply to the Court for the relief of Insolvent Debtors, for his discharge; and that Court, considering that he was not entitled to relief, punished him for making an improper application to them, by remanding him for a fixed period. He then thinks fit to come back to us and ask for a *supersedeas*, founded upon our rule. It would be quite monstrous to grant the application, and a mockery of the proceedings of both Courts. No one can fail to see, that there is in the circumstances of this case good and sufficient cause for refusing the application, within the very terms of the rule of Court upon which it is founded.

It is admitted, that if the Defendant were in custody also upon a charge of assault, the *supersedeas* would be nugatory. This appears to me to be very much the same case.

Per Curiam.

Rule discharged.

Coram RICHARDS, LORD CHIEF BARON.

1822.

TAUNTON *v.* GLYDE and others.

27th February.

BOTELER now applied to the Court *by motion*, pursuant to notice, that the Plaintiff having prosecuted the Defendants both at law and in this Court (in equity) for one and the same matter, his Clerk in Court might be ordered within six days to make his election in which Court he would proceed; and that if the Plaintiff should elect to proceed in this Court, then that his proceedings at law might be stayed by injunction of this Court, and that the Plaintiff might be ordered to pay the costs of such proceeding at law; and that if the Plaintiff should elect to proceed at law, or in default of election by the time aforesaid, then that the Plaintiff's bill should be dismissed out of this Court against the Defendants, with costs to be taxed, and also with the costs of this application.

Plaintiff in a suit by bill for tithes, having commenced an action at law for the treble value of part of the tithes, ordered (on motion) to elect within six days to proceed at law or in equity only, and the action at law to be stayed with costs, or the bill to be dismissed with costs, and the costs of the motion.

The affidavit of two of the Defendants stated that the object of the Plaintiff in this suit, who was lessee of the rectory, was to recover from the Defendants the value of the tithes of the corn and grain taken by them upon their farms since the 25th *March*, 1817;—that part of the said farms and lands in the occupation of the Deponents, the value of the tithes whereof was sought to be recovered by the Plaintiff's bill, were certain closes, &c.

1822.

TAUNTON

v.
GLYDE
and others.

(stating them by names and quantities of acres,) and were the same closes, the treble value of the tithes of wheat whereof was sought to be recovered by the Plaintiff in the action at law lately commenced by him against the Deponents in this Court,—verifying the particulars of the Plaintiff's demand in the actions.

RICHARDS, Chief Baron. The terms of this application are certainly not inconsistent with justice, nor with the rules of practice, which however vary a little now and then. I shall therefore make the order according to the notice of motion, unless the Plaintiff make an affidavit in denial of the facts sworn to by the Defendant. If he should do so, the motion must stand over till the next term, but the Plaintiff must not proceed at law in the mean time.

Ordered.

1822.

Wednesday,
27th February.

M'CALLUM v. BEALE and others.

An injunction until answer, or further order, having been obtained for want of answer, against a party residing abroad, to restrain proceedings in an action at law, the Court refused a motion to allow the Defendant to proceed to trial before the Defendant had answered.

THIS was a bill for discovery and account, and for an injunction to restrain the Defendants from proceeding at law in an action, and the injunction had been obtained for want of answer.

It was now moved by *Wakefield*, on the part of the Defendants, that the injunction granted in this cause

cause

The Court ordered the Defendant to pay the costs of opposing the motion.

cause might be dissolved, or that the Defendants might be at liberty to proceed to the trial of the action at law in the pleadings mentioned, on an affidavit of the Defendant's Attorney, stating that the Defendants had been constantly, and were still abroad; and that he believed that they could make no discovery which would aid the Plaintiff.

1822.
 M'CALLUM
 v.
 BEALE
 and others.

Roupell opposed the motion, on the ground that the Defendants were in contempt for want of answer, and therefore not in a condition to make this application by the course of the Court, the injunction having been granted till answer, or further order of the Court.

In this case, he submitted the Plaintiff could not safely suffer the trial to proceed without the Defendant's answer, the Plaintiff's Attorney having sworn to his belief of merits, and that the discovery was necessary to his defence at law.

The *Lord Chief Baron*.—The injunction has been obtained on an affidavit which we are now bound to consider true, and we cannot so far interfere with the injunction, as to allow the Defendants to proceed to trial till they have answered. They will therefore take nothing by their motion.

GRAHAM, Baron. We cannot cut down the injunction which has been obtained by the Plaintiff on a conjectural affidavit.

Motion refused.

1822.

M'CALLUM

v.

BEALE
and others.

The costs of opposing the motion were then asked.

This was opposed, on the ground that the costs of motions in matters of injunction are always costs in the cause.

Per Curiam.—There are many exceptions, and where the application is clearly without foundation, the costs of opposing must be paid by the party making the application.

END OF THE SITTINGS AFTER HILARY TERM.

1822.

IN VACATION.

At the residence of the Lord Chief Baron.

TUCKER v. SANGER and others.

Wednesday,
10th April.

Since the 57
Geo. the 3d. ch.
18. the Court
of Exchequer
for certain pur-
poses is consi-
dered open all
the year round
as a Court of
Equity*.

The Lord
Chief Baron
therefore will
take motions
for special in-
junctions to

stay waste, and in other matters which press, during the vacation (when the Court are not sitting) at his private residence, or whilst on circuit.

THE Lord Chief Baron being attended this day by the Solicitor and Clerk in Court for the Plaintiff.

Upon reading the certificate of the supplemental bill filed by the Plaintiff in this cause, and an affidavit of the said Plaintiff sworn this day,

Ordered

* *Vide ante*, p. 25.

Ordered an Injunction to restrain the Defendants *William Tucker* and *Richard Coppinger* and wife, from cutting timber, and committing other waste on the estate and premises in the bill mentioned *.

1822.
TUCKER
v.
SANGER
and others.

* The following cases of the same nature are to be found in the Minute Books.

GALLOWAY v. APPLETON.

COOPER moved for an injunction to stay waste, &c. when

The Lord Chief Baron made the following

ORDER.

Let the injunction issue according to the prayer of the bill, until answer or further order.

1821.
Thursday,
February 15th.

WESTMINSTER.

At the Revenue Sittings.

Coram RICHARDS, LORD CHIEF BARON.

1822.

CRESWELL v. LONG.

STEPHEN, for the Plaintiff, moved for an injunction to stay waste.

The petition of Plaintiff by *Joseph Pitt*, Esq. his next friend, presented this day, and affidavit of the said *J. Pitt* sworn 3d July instant, read.

Thursday,
July 4th.

Ordered the Defendant *Richard Estcourt* and *John Deverall*, their workmen, tenants, and agents, be restrained from felling, removing, or conveying from off the estates in question in this cause any of the timber, or other trees now growing or being thereon, and the bark, loppings, or toppings thereof, until the further order of the Court to the contrary.

Coram

1822.

Coram RICHARDS, LORD CHIEF BARON.

At the Assizes at Maidstone.

WILLIAMSON v. THOMPSON.

Monday,
August 12th.

ON the motion of Mr. *Abraham* for the Plaintiff in Equity, and Defendant at Law, that the issue directed as to the township of *Mallerstang* may be taken as confessed by the said Plaintiff in Equity, the Defendant in the issue; and that all further proceedings on the said issue may be stayed.

Ordered.—Without prejudice to the Defendant in Equity and the Plaintiff in the said issue, setting down cause for further directions under the decree.

1824.

Coram ALEXANDER, LORD CHIEF BARON.

Grosvenor Square.

Wednesday,
13th October.

RIGBY v. DRAKELEY.

ON reading the petition of the Plaintiff,

It is ordered by the *Lord Chief Baron*, that an injunction do issue to restrain the Defendant from collecting or recovering any outstanding debts or effects belonging to the late co-partnership between the Plaintiff and Defendant, or from interposing or meddling therewith, or from selling or disposing of any part of the joint effects.



[Affidavit of Plaintiff read in support of the petition.]

REPORTS
 OF
CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF EXCHEQUER,
 AND
EXCHEQUER CHAMBER.

EASTER TERM—3 GEO. IV.

In the matter of **LACY.**

1822.


Thursday,
25th April.


AN application for a fiat for an extent in aid having been made to Mr. Baron *Wood* in this case, and refused by his Lordship, referring the party to the Court—

It was now moved by *Abraham*, on the behalf of *Jonathan Lacy* the younger, Committee of the estate of *William Lacy*, a lunatic, that the bond entered

The Court refused to grant a fiat for an extent on an application made by a committee of a lunatic against a preceding committee (on the usual bond to the Crown) where he had been declared bankrupt under a commission of bankruptcy, issued against him so long as

ten years before the application.—The remedy of the party is by *scire facias*.—See the note in the next page.

1822.
In the matter of
LACY.

entered into by *Jonathan Lacy* the elder, the late Committee of the lunatic, and his sureties, *might be enrolled in this Court**, and that a writ of extent might be issued thereon against his real estate.

The affidavit on which the application was founded stated the bond to the Crown, (the common bond) which was dated the 26th *March*, 1776, and the condition : and that the condition had been broken by the Committee having rendered no account ;—that in *October*, 1803, a commission of bankruptcy issued against the Committee, who was duly declared a bankrupt, and his real estates sold in *September*, 1804 ;—that an order was made by the Chancellor on the 6th of *August* 1806, discharging the Committee from the custody and care of the lunatic and his estate ;—that on the 4th of *August*, 1817, it had been referred by the Chancellor to a Master, to take an account of the produce of the estate of the lunatic, which had come to the hands of the Committee from the date of the bond to the time of his becoming bankrupt,

* An insurmountable objection existed, but it was overlooked in this case, to the application for an extent, or any process out of this Court in aid of the party applying, even though it had been the Crown. It is, that the bond was not lodged and filed in the King's Remembrancer's Office previous to the application, whither by the course of the practice it should have been first sent, and by a formal writ of *mittimus*, in order to give the Court jurisdiction. That not having been done, the whole matter has been *coram non Judice*.

This proceeding, and the nature and reason of it, will be found to be fully explained in a forthcoming Treatise on the Court of Exchequer, by the author of these Reports, which is now in the press, and will be very shortly published.—See Chapter “ *On Proceedings upon Bonds to the Crown in the office of the King's Remembrancer.*”

and

and that it was certified that 2160*l.* 18*s.* was due from the Committee to the estate of the lunatic on the 1st of *October* 1803.

1822.
In the matter of
LACY.

The affidavit then stated, that such balance still remained due and unpaid, and that the said debt was in danger of being lost to the lunatic's estate, unless a more speedy remedy than the ordinary method of proceeding should be had to recover the same.

To obviate the objection of the lapse of time, it was urged, that this application could not have been made before, because from the delay which had taken place in the rendering and investigating the accounts, and the time occupied therein, the balance due from the bankrupt was not ascertained; but

The Court refused the application, for that they could not now disturb what had been done under a commission of bankruptcy issued so long ago, affecting purchases for valuable consideration without notice. Another difficulty which they suggested was, as to the parties against whom the writ should now be issued. They also observed, that this mode of furnishing the Court with the circumstances did not sufficiently establish the facts to warrant the proceeding sought to be resorted to. They therefore refused the application, saying, that the only proper course of proceeding was by *scire facias*.

Refused.

STANLEY,

1822.

Friday,
26th April.

STANLEY, Bart. v. WHARTON.

In an action upon the stat. of the 11 of Geo. the 2d. ch. 19. sect. 3. against a Defendant, for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the Defendant, if by other evidence he is proved to have contributed to the facility of it: and circumstances of suspicion may be laid before the Jury, to prove such a fraudulent co-operation as the legislature contemplated.

It is not necessary, to support such an

action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated. It is enough if the rent be shewn to be in arrear, and that the goods have been removed afterwards.

The remedy given by the 4th section of the statute, of applying to two magistrates in a summary way, where the amount in value of goods removed is under 50*l.* is cumulative, and the landlord may elect, at his option, whatever course may be most convenient to him to adopt; and therefore the Courts of Law are not ousted of their jurisdiction by that provision.

The Court refused to grant a rule to arrest judgment on that last objection, and they refused to grant a rule to shew cause why a new trial should not be had on the former objections.

A RULE having been made absolute for a new trial in this cause, it came on again at the last *Chester Assizes*, when the Jury found a verdict for the Plaintiff.

Jones, D. F., now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted, and why the judgment should not be arrested, on the following several objections taken to the record, and to the admissibility and sufficiency of the evidence adduced in support of the Plaintiff's case.

The Defendant was charged with knowingly aiding and assisting *Delamore*, a tenant of the Plaintiff, in fraudulently removing his goods and chattels (three cows), in order to prevent the landlord from distraining for rent; and in another count, with aiding and assisting in the fraudulent concealment of them, contrary to the statute on which the declaration was framed—the 11 Geo. II. ch. 19. s. 3.


To

To prove his case, the Plaintiff called witnesses, who stated that the rent being due to the landlord, by order of the tenant cows were driven off early in the morning of the 2d of *October*, a few days before the Plaintiff sent to distrain, from the tenant's farm to the Defendant's, who was his son-in-law, and had been at his house the preceding *Sunday*—that wheat and cheese were also removed to other premises.

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STANLEY,
Bart.
D.
WHARTON.

It was proved that young *Delamore*, the tenant's son, who assisted him in the farm, said, he expected the bailiffs—that the cows, which had been driven to the Defendant's before his servants were up, were kept there by him for some days, in his field, after having been at first put into the cow-house; and that the Defendant denied any knowledge of them, when asked about them by persons enquiring on behalf of the landlord; but acknowledged having them, and shewed them to other persons, particularly to a butcher, who called to say he had bought one of the cows, when the Defendant said, she was in a field, which he described, where he found her—that *Delamore* removed the cheese and some household furniture to different neighbours' houses, and the wheat was also carried to the premises of other persons.

First, it was objected in arrest of judgment, that the action would not lie; for by the words of the 4th section of the statute the Plaintiff should have applied to two Justices of the Peace for summary process in this case, where the goods (as appeared

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 STANLEY,
 Bart.
 v.
 WHARTON.

peared by the record), were under the value of 50*l.*, and that that provision in the act of parliament had the effect of confining the remedy in such cases to the application to Magistrates, and had ousted the Courts of Law of jurisdiction; and he cited the cases of *Cates, qui tam, v. Knight (a)*, and *Fleming, qui tam, v. Bailey (b)*.

But if the Court should be of opinion that there was not sufficient ground for arresting the judgment on that point, he submitted that there ought to be a new trial granted—

1st. Because evidence of acts and orders of *De-lamore*, the tenant, respecting the goods removed both to the Defendant's house and other places, was received on the trial, which was objected to and ought not to have been admitted; and proof of other things to other places should not have been admitted against the Defendant, in order to fix him with the charge of fraudulently assisting in removing and concealing the cows; or at least it ought to have been shewn that he knew and was aware of those acts and orders, to establish his participation.

✓ 2dly. There was no privity or connection shewn between the Tenant and the Defendant; and agency for the purposes of fraud, is not to be presumed, nor is any man responsible for the criminal acts of his agent. The act by which a man is to be fixed

(a) 3 Term. Rep. 44.

(b) 5 East. 313.

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with a penalty must be distinctly and clearly proved; and here there must be some co-operation shewn, because the charges against the Defendant, in conformity with the terms of the statute, are, that he was *aiding and assisting* in the removal and concealment, whereas there was neither any proof of the aiding and assisting in the removal, nor was there any concealment on the part of the Defendant in evidence at all.

3dly. There was no proof of any distress having been commenced, or even contemplated, and there must be a distress in progress, or at least intended, otherwise the removal is not within the mischief meant to be remedied by the act.

RICHARDS, *Lord Chief Baron*.—As to the objection said to arise on the face of the record, that the Courts of *Westminster Hall* have no jurisdiction in this case—that point has been already well considered, on the occasion of the former application, when the Court, after having attentively examined the statutes, decided that there was nothing in it; and that was a necessary part of the determination of the Court when we ordered a new trial. I am still of the same opinion, and think there is no weight in it. The landlord may take which course he pleases, or may consider most convenient. The hardship is no argument against it; but the hardship is much less than that which the quakers, with more reason, have to complain of, in being sued for tithes, as they often are, before magistrates, and in the Courts at *Westminster*.
At

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WEARTON.

At one time a bill was attempted to be brought in to remedy that alleged grievance, but it did not succeed. There is no ground for our arresting judgment in this case on that ground.

As to the admissibility of the evidence received, I was of opinion before, as I am now, that there was sufficient evidence to obtain for the Plaintiff a verdict. The facts charged in the pleadings could only be proved before the Jury by giving evidence of the acts of *Delamore*, and from those acts his intentions were to be inferred, as was also the knowledge of those intentions on the part of the Defendant. To shew the fraudulent removal, was all that could be done. It was not necessary to prove the tenant himself taking part in the fraud. Then the other evidence connects the Defendant with the fraud, in which he implicates himself by the share he takes in contributing to its success. As to his actually driving the cows away, or concealing them when they arrived—that was all matter of consideration for the Jury on the evidence before them; and from what has passed on both occasions, I am of opinion that they came to a right conclusion.

GRAHAM, *Baron*.—The arguments which have been used to-day, and on the former motion, clearly shew to my mind the propriety of our decision; that this was a proper suit to be carried into a Court of Law rather than to be referred to the summary jurisdiction of the Magistrates; for if this be a question of difficulty, which we are now called


called upon to determine, what can be a greater proof than that a Court of Law ought to determine it with the aid of a Jury, and not the Magistrates in the county, without any assistance?

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The proof of fraud, I think, was not only admissible, but conclusive. It is true, a principal is civilly responsible only, and not criminally, for the act of his agent. But this is not a question of agency, but of aiding and assisting in the commission of a fraud, contrary to the provisions of this particular statute. The facts which were given in evidence appear to me to have been the only means by which the fraud could be proved, and I think they prove it sufficiently satisfactory, and make out this case by bringing the Defendant within the statute. Can there be any doubt, that, in an affair of this sort, where a tenant calls in aid his son-in-law, for the purpose of defrauding his landlord, the evidence which was received, and is objected to, was admissible? Being admitted, it proves the Plaintiff's case; for it fixes the Defendant with intimate knowledge of all that was going on, and the intention and object of it. Better evidence to enable a jury to draw a proper conclusion, could not, in my opinion, have been laid before them. It was a matter altogether for them to form their judgment on, and they have done so, as I think, most properly.

On the point now made, that it should have been proved that a distress had been in inception, or at least in contemplation, I cannot see why that should

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should be necessary. It seems to be quite sufficient if the landlord at the time of the fraudulent removal of goods, be entitled to distrain, the rent being at the time in arrear. To have begun to distrain, is indeed a thing almost impossible in these cases ; for the goods are, I presume, usually removed too alertly or clandestinely to allow the landlord an opportunity. That it is which the statute meant to remedy ; and if the argument we have heard to-day were correct, the operation of the act would be in most instances defective, and its provisions rendered altogether nugatory.

Wood, *Baron*.—I am of the same opinion entirely. As to the point on which the application to arrest the judgment is made, I am of opinion that under this act of parliament, the landlord is given an option, where the value of the goods removed does not exceed 50*l.*, whether he will proceed by action of debt in either of the Courts of Record at *Westminster*, upon the third section, or by summary application to two or more Justices of the Peace, under the 4th section, as he shall think most proper, according to particular circumstances of his case. If there had been in this statute any restrictive words or provisions, such as giving the Justices a power of mitigation, as in the act of the 25 *Geo.* III. ch. 51., there might then be some ground to contend that it was intended to give exclusive jurisdiction to the Justices only, and that therefore the Courts of Record at *Westminster* were ousted of jurisdiction by necessary implication. But in point of fact there are no such words ;

words; therefore it comes to the common case of an act of parliament providing merely that it shall and may be lawful for the landlord to adopt that mode of proceeding, if he should think fit, clearly leaving him an option to elect either: and there may be often very good reason for his preferring one to the other, according to circumstances, as the case may be. It is absurd to suppose that that section was introduced for the benefit of the fraudulent tenant. That objection therefore falls to the ground.

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I am of opinion also, that the evidence which was admitted in this case was properly received. If we look at the nature of the case, we shall find that it was the very kind of evidence most likely to be obtained, if the charge were true; and, when found, the most likely to lead the Jury to the proper conclusion. The charge to be proved was a charge of fraud, by a scheme which was to be practised as secretly as possible. It was necessarily to be arranged privately and amongst themselves. The object was, to withdraw the goods from the reach and eye of the landlord. Of course, in an action of this nature, it was necessary to shew that there existed in the tenant's mind a fraudulent design and intention, and *quo animo* the scheme of removal was planned and effected: in short, that it was a fraudulent removal for the purpose of cheating the landlord, by depriving him of his legal remedy. [Here his Lordship stated the circumstances in evidence attending the removal.] Was not all this admissible evidence to prove the fraudulent intention?

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and

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and does it not completely prove it? or how otherwise could it be proved?

For what purpose were these different removals made? Could they have been practised with any other object, under the circumstances, than that of fraud? No other cause was assigned for these removals, nor were they attempted to be explained. No doubt, no good or satisfactory reason could be given.

Another objection is, that there was no concealment proved to affect the Defendant; but what is the evidence? It appears that the cows were for part of the time in the open field, as it is called; but when the butcher came to enquire for one of them, he is told where she is, and he finds her there. She was, therefore, until he was informed where to find her, completely *concealed*, *quoad* him, without doubt; nor can there be less doubt that she was also concealed from the agent of the landlord.

Then it was contended, that there ought to have been some proceeding proved to have been taken towards making a distress for the rent in arrear, in order to bring this removal and concealment within the statute: at least, it is said, that it should have been shewn that the landlord had it in contemplation to distrain. Now, I will suppose that it was not, at the time of the removal of the cattle, the intention of the landlord to distrain; but I think the removal, under these circumstances,

rent

rent being then due, and the tenant unable or unwilling to pay it, was nevertheless completely, within the statute, a fraudulent conveying away of goods and chattels from off the premises, to prevent the landlord from distraining for arrears of rent reserved; and if so, that objection also falls to the ground.

GARROW, *Baron*, expressed his entire concurrence.

Per Curiam,

Rule refused.

KNIBBS v. HOPCRAFT.

IT had been ordered (on the motion of *Manning*) that the Plaintiff should shew cause why the inquiry which had been taken in this cause, and the subsequent proceedings, should not be set aside, with costs, for irregularity, and why he should not pay the costs of the application.

The motion was founded on an objection conceived to the service of notice of the writ of inquiry,

in the cause, nor any notice given to either of them, of such entry.

Notice of executing writ of inquiry does not require the signature of a Clerk in Court.

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1822.

Friday,
10th May.

It is no objection to the service of notice executing a writ of enquiry, that it was left at Defendant's house in the country, during his temporary absence from home: nor that such notice had not been entered in the order book in the office of Pleas, nor had been served on his Attorney or Clerk in Court

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ry, because *it had been left at the Defendant's house in the country.*

In the affidavit made by the Defendant in support of the application, he deposed, that on the 3d of *March* last, he received from his servant, residing at his farm in *Crowton* (*Northamptonshire*), the notice (dated the 28th of *February*), inclosed in a letter to him at *Hinton*, apprising him that the writ of inquiry was intended to be executed at *Orford* (forty-two miles from *Hinton*) on the 8th of *March* * :—that he forwarded it immediately to his Solicitor in *London*, but in consequence of its having been served at *Crowton*, he was unable to get advised in time to attend the inquiry ;—that his Solicitor had previously informed him that such notice would be served on him the Solicitor, and that the Deponent need not feel anxious about it; and that he was prevented by the irregularity from opposing the inquiry. The Defendant also swore, that the whole of the Plaintiff's demand was not a just one.

The Defendant's Solicitor swore, that he received the notice from the Defendant on the 5th of *March*, and that no notice of executing the writ of inquiry had been served on *him* or his Clerk in Court, and that no such notice had been entered in the order book in the office of the Exchequer of Pleas.

* The writ was served in *London* ; the notice of declaration in *Crowton*.

In opposition to the rule which had been obtained by the Defendant, an affidavit was filed, made by the Plaintiff's attorney, wherein it was sworn, that for the last twelve years, *Crowton* was the Defendant's most usual residence and place of abode, where he carries on the business of land-agent and surveyor, and occupies a considerable farm. The affidavit also set forth a letter, dated *April* the 9th, received by Deponent from the Defendant, requesting time till *May* to pay the amount of the Plaintiff's demand, and requiring the Deponent to address to *Crowton*, if necessary; and it detailed other correspondences and conversations, to the same effect.

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Cross shewed cause.—It being understood that the Defendant, in support of his motion, meant to rely on the irregularity in service of the notice of the execution of the writ of inquiry, founded on the objection of non-compliance with the rule of Court of *Hil. Term*, 39th *Geo. III.** the discussion was confined to that objection. It was insisted, that the practice, as stated in *Manning* (a) on this point, that the notice of inquiry, where the Defendant has appeared, must be entered in the book of

* That all notices of trial and of the execution of writs of inquiry to be given by the Attorneys, or Side Clerks of the Office of Pleas in this Court, in causes instituted there, shall be entered in the book of orders kept in such office, and a written notice of all such entries shall be left at the seat in the said office of the Attorney or Clerk in Court concerned for the Defendant, or at his chambers or place of residence.

(a) *Man. Pract. of Exch. of Pleas*, vol. 1. p. 203.

orders,

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orders, was not correct, and that the rule (*Hil. T. 39 Geo. III.*) to which he refers, does not warrant that unqualified and general *dictum*. The object of the rule was not to make a regulation that all notices of executing writs of inquiry should, in all cases, be entered in the book of orders and served on the Clerk in Court, but that where the Attorney or Clerk in Court of the Plaintiff should serve the Defendant's Attorney or Clerk in Court, and not the Defendant himself, with such notice—in *that case* the formalities of the rule were required to be observed. By a former rule, made in *Hil. T.* in the 5th year of *Geo. III.* it is ordered, that in case of judgment being signed against the Defendant, for not pleading within the time specified in the notice to plead on the declaration filed *de bene esse* at the return of process, where no imparlance have been granted, the Plaintiff may give notice of executing a writ of inquiry, either by delivering a notice in writing to such Defendant, his Attorney, or Clerk in Court, or by leaving the same *at his last or most usual place of abode*,—distinctly recognizing the propriety of the service in the present instance.

He also objected, that it had not been shewn in this case that the Defendant had appeared, or had a Clerk in Court. He submitted, therefore, that this rule should be discharged with costs.

Manning, in support of the rule, relied on the words of the order, and insisted that the formalities required to be observed by the order of Court could

could not be dispensed with, and that the notice, not having been entered in the book of orders, nor any notice of such entry left with the Attorney or Clerk in Court, was insufficient, and the Defendant was not bound to attend to it. This notice (he stated) was in another respect informal ; for it was not signed by the Attorney or Clerk in Court in the cause, but by the Solicitor in the country ; which was also an omission that amounted to an irregularity, affecting it with want of authenticity.

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v.
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As to the objection that it ought to have been shewn that the Defendant had appeared by a Clerk in Court, he submitted, that could not be necessary, as it might be seen by inspecting the Appearance Book.

The Court enquired of the Master what had been the course of practice ; and he reported that it was not necessary *that the notice of executing a writ of inquiry* should be signed by a Clerk in Court, and that it was not necessary that it should be served on the Defendant's Attorney or Clerk in Court ; but it was sufficient if left at the last or most usual place of abode of the Defendant.

The Court determined that the objections were unfounded, and

Discharged the Rule, *with Costs.*

GODBER

1822.

May 17th.

GODBER v. LAURIE,

The Court will not act upon the separate examination of a married woman, in disposing (according to her direction) of a fund in Court, the amount of her share of which has not been ascertained and stated by the Master's Report.

Nor whilst any part of the share of the feme covert is not so ascertained, will the Court dispose of such specific part, as is reported to belong to her.

Mrs. *Daykin* and Mrs. *Clayton*, were pecuniary legatees, and also residuary legatees of *James Whittle*, for the administration of whose personal estate this suit was instituted. By a decretal order, made on hearing the cause, for further directions, on the 2nd of *May*, 1822, it was ordered, that the master's general report, in which, amongst other things, he stated, that 276*l.* 3*s.* 9*d.* was due to Mrs. *Daykin*, in respect of her pecuniary legacy; and that 68*l.* 15*s.* 4*d.* was due to Mrs. *Clayton*, in respect of her pecuniary legacy, (but the report did not ascertain the amount of their shares of the residue of the testator's estate,) should be confirmed; and that one or more commission or commissions, should be issued under the seal of the Court, directed to proper commissioners, for the purpose of examining Mrs. *Daykin*, and Mrs. *Clayton* respectively, separate and apart from their husbands, as to whom they would have the several sums of money reported due to them, respectively, for principal and interest, in respect of their several legacies, and also their respective shares and proportions of and in the residue of the said testator's estate, transferred and paid; and that upon the return of the said commission, such further order should be made as should be just.

A commission having accordingly issued, the
commissioners

commissioners certified that they had examined Mrs. *Daykin* apart from her husband, and that she declared she was desirous that the said sum of 276*l.* 3*s.* 9*d.*, and also her share of the residue of the testator's estate, should be paid to two persons named in the certificate; and that they had also examined Mrs. *Clayton*, and that she declared that she was desirous that 500*l.*, part of the 681*l.* 15*s.* 4*d.*, before mentioned, should be paid to two persons named in the certificate; and that 181*l.* 15*s.* 4*d.*, residue of the 681*l.* 15*s.* 4*d.*, and also her share of the residue of the testator's estate, should be transferred and paid to her husband.

1822.

GODFREY

LAURIE.

A petition (which was not opposed) was afterwards presented by Mr. and Mrs. *Daykin*, and Mr. and Mrs. *Clayton*, praying that the Accountant General might be ordered to pay, not only the sums specified in the examinations, but also the shares of Mrs. *Daykin* and Mrs. *Clayton*, in the residue of the testator's estate, to the persons to whom they were desired to be paid upon the examinations.

But the *Lord Chief Baron* refused to make the order, observing, that the decretal order had been improperly drawn up, because the Court could not take the examination of a married woman, as to the disposal of a fund which was not ascertained (a), as was the case here, with regard to the residue: and on its being suggested by the counsel for the

(a) See acc. *Edmonds v. Townshend*, 1 Anst. 93; and *Sperling v. Rochfort*, 8 Ves. 180.

petitioners,

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GODBER

P.
LAURIE.

petitioners, that the objection did not apply to the sums reported due on account of the pecuniary legacies, and that payment of those sums might be ordered, his Lordship said, that if the amount of the residue had been made known to the married women before their examinations, they might possibly have made a different disposal of the pecuniary legacies, and he directed the petition to stand over, that the shares of the residue might be ascertained, and that afterwards the married women might be examined again.

1822.

Saturday,
11th May.

BENNETT v. ISAAC, Esq.

The Plaintiff in
an action of
debt against a
Sheriff for an

THIS was an action of debt, brought against the
Sheriff

escape of a Debtor of the Plaintiff, in execution under a *capias ad satisfaciendum*, alleged in his declaration, (*Michaelmas* term, 2 Geo. 4,) issued on a judgment by default, that he (the Plaintiff) thenceforth, to wit, in *Hilary* term in the 2d year of the reign of the now King, recovered judgment against the Debtor in an action of assumpsit, as by the record and proceedings thereof now existing, &c. more fully and at large appears. *Scilicet*, that allegation of a judgment recovered in *Hilary* term, 2 Geo. 4. is proved by a record of a judgment recovered in *Hilary* term 1 and 2 Geo. 4.


To prove that averment, the record of the cause and judgment was put in, whereby it appeared that the judgment was recovered in *Hilary* term, in the 1st and 2d years of Geo. 4. The marginal note to the Roll stated that the judgment was signed the 26th March, 1821.

It was objected on the trial, and on a motion to set aside the verdict found for the Plaintiff, that there was a material variance between the allegation in the declaration and the record produced in evidence: and that the variance was fatal, as the proof had failed to support the allegation, which, as it concluded with a *prout patet per recordum*, was matter of description, and therefore ought to have been proved *ad litteram*.—Determined not to be a material variance even if it were a variance in fact, and not merely an imperfect intelligible reference to the record.

Where the action is not founded on the record referred to, it is sufficient if the description of it, used for the purpose of reference to it alone, describe it intelligibly enough for that end; for if it be referred to as a matter of fact, and not essentially as the basis of the action by allegations in the declaration, they are not matter of substance, and such a variance between the description of it and the allegation, as does not leave any doubt as to the identity of the record referred to, is not material, although concluding with a *prout patet per recordum*, for those words do not make certainty of description in the allegation material, where without them it would be immaterial.

The Court will notice legal fictions, to avoid their working injustice by affording ground for objections merely technical, and having no other, or real foundation.

Sheriff of *Worcestershire*, for an escape, in suffering a Defendant, who had been taken in execution by the Sheriff under final process at the suit of the Plaintiff, to be at large after he had been arrested, to recover from the Sheriff the amount for which the execution had been issued.

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 BENNETT
 v.
 ISAAC, Esq.

On the trial of the cause at the last assizes for the county of *Worcester*, the Plaintiff had a verdict; but the learned Judge who tried the cause gave the Defendant leave to move that a nonsuit might be entered, on the objection to the declaration.

This Term, *Campbell* obtained a rule, requiring the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered; insisting that there was a fatal variance between the allegation on the record and the proof, the declaration stating that the Plaintiff heretofore, to wit, in *Hilary* Term, in the second year of the reign of our Sovereign Lord the now King, before the Barons &c. recovered against one *John Mee* judgment in an action of assumpsit, &c. &c. as by the record and proceedings thereof, now existing in his said Majesty's Exchequer at *Westminster*, more fully and at large appears*; whereas it appeared by the *nisi prius* record, when produced, that the judgment was of *Hilary* Term, in the 1st and 2d of *Geo. IV.* It was submitted, that the

* There was also a second count in the declaration, containing a similar allegation.

early

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BENNETT

ISAAC, Esq.

early part of the Term was in fact the 1st of *Geo. IV.*, and that the judgment which had been recorded against *Mee*, was in truth a judgment of the first year of the present King's reign, and therefore, as the allegation concluded with a *prout patet per recordum*, it was fatal; because it was thereby made matter of description, and not of mere allegation.

The following cases were referred to, on moving for the rule: *Rastall v. Straton* (a). *Green v. Bennett* (b), and *Pope v. Foster* (c); and the case of *Purcel v. Macnamara* (d) was distinguished from the present by the omission in the declaration in that case of any reference to the record, by the usual conclusion, *prout patet, &c.* The case of *Phillips v. Shaw* (e) was also adverted to, where it was reported that the Court of *King's Bench* refused a rule to shew cause why a nonsuit should not be entered, on the objection of there being a variance between the record and the statement in the declaration (with a *prout patet*) that judgment had been recovered in *Michaelmas* Term, 58 *Geo. III.*, whereas it was in *Hilary* Term in the same year. It was stated, that the Court did not proceed on the ground of the variance in that case not being fatal, but for another reason, which does not appear in the report; for there being in fact another count in the declaration in that case, having the same allegation, with an omission of the conclusion, *prout*

(a) 1 H. Bl. 49.

(b) 1 Term Rep. 656.

(c) 4 Term Rep. 590.

(d) 9 East, 157.

(e) 4 Barn. & Ald. 435.

patet,

patet, the Court held, that as there was a sufficient count under which the verdict might be supported on the evidence, they would not consider the verdict to have been taken on a count which was at variance with the proof*.

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Mr. Baron GARROW having reported,

Jervis and *Russel* now shewed cause. They submitted that there was in fact no variance in this case;—that if there was, it was not a variance in description, and therefore not material;—and that, in all events, the marginal side note to the record †, which stated the true day on which the judgment had been actually signed, in pursuance of the provision of the Statute of Frauds in that respect, had obviated any supposed objection on the ground of variance.

First, the Term was in fact partly within the 2nd year of *Geo. IV.*, and this declaration, filed in the 2nd *Geo. IV.*, states, that heretofore (to wit) in the 2nd year of *Geo. IV. &c. &c.*, and therefore the verbal inaccuracy of the allegation, wherein it was called the 1st and 2nd year of the reign in the record, was not a misdescription of the record, and the allegation itself was consistent with the fact, and was at the utmost only an imperfect reference.

Secondly.—This statement in the declaration

* This error was admitted as stated.

† The note was judgment signed 26th of *March*, 1821.

was

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was not material, as it was merely matter of allegation, in support of which distinct and positive proof was not absolutely necessary; and it would be sufficient to shew that the judgment was recovered at any time prior to the Defendant being in custody under the *capias ad satisfaciendum*, and strict proof of the precise time was not required. The precise time of the recovery of the judgment was not in any respect material to the merits of this action on either side; and therefore the allegation was matter of substance rather than of description, and did not, if it were shewn to be substantially true, require literal proof in this respect. They submitted, the present was quite distinguishable from all those which had been cited, in each of which there had been a broad palpable variance, and were decided on the plea of *nul tiel record*; and it was material that the allegation should be precise and correct in the matter professed to be described. And they insisted that the case of *Purcell v. Macnamara* (*f*), which had expressly overruled the decision in *Pope v. Foster*, was precisely in point, as a well-considered authority for holding, that in a case like the present, the allegation was one of substance merely, and not of description, for the reasons there given in the judgment; and that therefore the alleged variance (if it were one) was not material after verdict, whatever it might have been on special demurrer. They also cited *Com. Dig. tit. Record* (*D*), *Dorset v. Lane* (*g*), and *Parry v. Paris* (*h*).

(*f*) 2 East, 157.(*g*) Dyer, 234.(*h*) Hob. 209.

Thirdly.

Thirdly.—The marginal note on the record had shewn when it was produced, that in fact the judgment was signed in *March*; and the relation to the preceding term was merely a technical fiction, particularly the carrying it back to the first day, of which the Plaintiff ought not to be permitted to avail himself against the justice of the case. *Johnson v. Smith* (i).

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They therefore submitted, that there was no ground for disturbing the verdict.

Campbell and *Ryan*, in support of the rule, insisted that by the plea of the general issue, every allegation was put in issue, and must be proved as stated. The Plaintiff has alleged that by a record remaining &c. it will appear that another person recovered a judgment in *Hilary* Term, in the 2d of *Geo. IV.* The record being produced, turns out to be a record of the 1st of *Geo. IV.* The judgment being of *Hilary* Term generally, and consequently of the 23d of *January*, which was in the first year of the King's reign, and the time for imparlance is until in eight days of St. *Hilary*, which was in the 1st of *Geo. IV.*; and the Courts will judicially notice that the time of the King's accession was the 29th. Had this been averred to be a judgment of the 1st year, it would have been right; and it cannot bear out at once two inconsistent allegations. In this case too, the judgment was by default, which makes it a judgment specifically of the 1st

(i) 2 Burr. 962.

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day of Term, at which day (the record accordingly states) come the parties, and the Defendant says nothing in bar. Therefore it is considered that the Plaintiff recover. If *nul tiel record* had been pleaded to that averment, the Defendant must have succeeded on the variance now objected.

On that point they cited the case of *Bryant v. Withers*, where it was determined that the statute described in the Statute Book under the year 2^{do} *vulgo* 1^{mo} *Jac.* must be pleaded as of the first year; and a plea describing it as made in the second year of *James*, was held bad, the Court being of that opinion, because the act related to the first day of the parliament, and that day appeared to be in the first year of the reign of King *James*.

The judgment being therefore undoubtedly of the first day of the Term, and in that part of it, consequently, which was in the first year of the reign of *Geo. IV.* there is a variance on the record from the statement in the declaration, as complete and palpable as if it had been *Hilary* in the declaration and *Michaelmas* in the record. The question then arises, whether that is such a variance as is fatal? and that must depend, certainly, on whether it is mere matter of allegation, or of description. It has been always held, that a variance in matter of description is fatal, and that whenever the allegation concludes with a *prout patet*, that makes it matter of description, and it must therefore necessarily be strictly and accurately proved, without any, the least, variance. This averment is
with

with a *prout patet*, and being thereby made matter of description, has rendered fatal the different statement of the record vouched.

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They contended also that the marginal note, which formed no part of the record, and the introduction of which as a mere memorandum was required by statute *diverso intuitu*, could not be applied to cure an error of pleading, and that it was not competent to the Plaintiff now to shew the real day of signing judgment for that purpose, as the question was not now on the verity of the statement, but the variance of it.

They then cited the following authorities, (giving up that of the case of *Pope v. Foster*,) which, they insisted, established that such a misdescription of the record was a fatal variance, where referred to by *prout patet per recordum*. *Rastall v. Stratton* (k). *Phillipson and another v. Mangles* (l). *Myers v. Kent* (m). The case of *Purcell v. Macnamara* (n) also, which had been cited in shewing cause, they contended, was an authority in favour of this objection, as far as the reasoning of the learned Judges was applicable to the allegation in this declaration; for Lord *Ellenborough* rests his opinion upon the fact of the day of acquittal being alleged without a *prout patet per recordum*. “If, however (his Lordship says, in a subsequent part of the judgment) it had gone on to state that the ac-

(k) 1 H. Bl. 49.

(m) 2 New Rep. 465.

(l) 11 East. Rep. 516.

(n) 9 East. Rep. 160.

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quittal was on a certain day, as appears by the record, that might have been considered as descriptive of the record, and then the variance would have been fatal."

[Mr. Baron *Wood* directed the attention of Counsel to the opinions delivered by the other Judges, particularly Mr. Justice *Le Blanc*, who observes that he cannot see any reason why, where a fact is not material to be alleged on the exact day, and need not be proved exactly as laid, and the allegation of the day is not particularly descriptive of the record referred to, that it should become material because it appears by matter of record instead of by parol evidence. Mr. Justice *Lawrence* also says, that if the acquittal appeared to have been on a day prior to the bringing of the action, that was all which it was necessary for the Plaintiff to prove; and therefore there was no contradiction of the record. It was no more necessary to prove the precise day of the acquittal, as laid in the declaration, than it is upon an indictment for murder, or a declaration upon promises, to prove the precise day laid of committing the murder, or of making the promises.]

The case of *Phillips v. Shaw* (o) also, as corrected, according to what passed in Court, and the declaration upon which the objection taken was founded, would also, they urged, afford authority in favour of that objection. When the point was

(o) 4 Barn. & Ald. 435.

made,

made, by the motion, *Marryat*, for the Plaintiff, admitted that he could not support the verdict on the first count, when the Lord Chief Justice, pointing out the omission of the *prout patet* in the second count of the declaration said, that on that count it might be supported, taking the precise distinction on which this objection rests.

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The questions of materiality and variance, they submitted, did not depend on the allegation being laid under a *viz.* or on its being necessary; for where an averment is material, though coming after a *videlicet*, it must be proved as laid. *Johnson v. Pricket*, E. 25 Geo. III. (p). In *Webb v. Herne and another, Sheriff of Middlesex* (q), for an escape, an allegation that the party was arrested under a writ endorsed by virtue of an affidavit now on record, it was held that that being a substantive averment, must be proved, although unnecessary; and in *Turner v. Eyles* (r), which was an action for the escape of a prisoner who had been taken in execution, the declaration alleged that he was commanded by a Judge of the Court of *King's Bench*, as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said Court, more fully appears; and it was determined that a commitment by a Judge of the *King's Bench*, not filed of record, would not support the action, and that the allegation, even if unnecessary, must be proved as laid. They there-

(p) 2 Williams, Saund. 291,
b.

(q) 1 Bos. & Pull. 281.

(r) Bos. & Pull. 456.

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fore contended that the present verdict could not be supported.

[WOOD, *Baron*.—The materiality of averments must always depend on the circumstances of each particular case.]

RICHARDS, *Lord Chief Baron*.—We are of opinion that if there be any variance between the allegation in this declaration and the record produced in support of it by proof, (of which we have very considerable doubt) it is such a variance as the statement on which the objection is founded in this case, certainly cannot be considered in any respect material. The case of *Purcell v. Macnamara*, clearly, does not contain any thing which can be cited in support of the objection now taken, as applied to this case at least; but favors, on the contrary, as far as it is applicable, the answer which has been given to it by the Counsel for the Plaintiff.

GRAHAM, *Baron*.—I am strongly inclined to think also, that there is no variance in this case. I am sure, at least, that it is not an essential one. I admit that an allegation with *prout patet* binds a Plaintiff to accuracy in his description; but this record, which was produced, is clearly the very record of which he speaks, and it is sufficiently described for every purpose. The allegation refers to a record of *Hilary* Term in the 2d year of *Geo. IV.* This is a record of *Hilary* Term, and the year in which the *Hilary* Term of 1821 occurred

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red was partly in the 2d year of *Geo. IV.*, and the Court will notice when the first year of the reign ended, and the second began. If there were any doubt about the time when the judgment was recovered, whether in the first or the latter part of the Term, the Defendant's Counsel say the record would prove that it was entered up on the 23d of *January*. Now that I deny. It could not be entered up on the first day of Term, because the Defendant must necessarily have the usual time to plead after appearance; and judgment could not have been signed till five or six days after the first day of Term. A judgment of the Vacation being considered as referring to the first day of the preceding Term, is merely a fiction of law; and it may have many good effects, as the rendering a search the more easy: but that fiction must not be suffered to work an injustice, and that is an established maxim of the law. The Court, to prevent its operating injuriously, may, and frequently do, inquire of the fact of the actual day on which judgment was entered up, as for the purpose of ascertaining whether the case is within the Statute of Limitations; and on other occasions of the same nature. By inspection of the record, we find that an imparlance was granted till the 23d of *January*; and from the marginal note we learn the precise day on which the judgment was actually signed; and the marginal note is part of the record, and it is made so for the express purpose of preventing injustice in consequence of the legal fiction; and if we are entitled to have recourse to it for the sake of the fact, what matters it whether the first five or

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or six days of the Term happen to be within the first year of the reign of the King, and the rest of the Term within the second; we surely ought not to suffer that accident to produce a denial of justice.

WOOD, *Baron*.—I think that there has been no material variance shewn to exist in this case. This is precisely the same case as that of *Purcell v. Macnamara*. The substance of this averment is, that the Plaintiff had recovered judgment in an action brought by him against the person whom the sheriff had in custody, under a *capias ad satisfaciendum*, sued out on that judgment; and that is stated in an action brought against this Defendant, for suffering him to escape. The alleged mistake, on which this objection is founded, is, that the declaration referring to the record of judgment, recovered by the Plaintiff, on which the execution was sued out, describes the record as of *Hilary* Term, in the 2nd year of the reign of the King,—that Term being, in fact, partly in the 1st, and partly in the 2nd year of his reign. The declaration is filed in *Michaelmas* Term, in the 2nd year of *Geo. IV.*, and when it refers to a judgment recovered in *Hilary* Term, also in the 2nd year of *Geo. IV.*, it must be taken to refer to the preceding *Hilary* Term. We can have no doubt of it. The averment corresponds with the substance of the declaration. It is not of the essence of the action, that the description of the record should be more strictly and literally correct; and the record clearly corresponds with the description of it,
in

in substance and in fact. It was however not necessary that the allegations in this case should have described the record so strictly or precisely, as if the action had been founded on the record; in which case, certainly, accuracy in stating it would be required. It was on that principle that the judgment of the Court proceeded in the case of *Purcell v. Macnamara*. Lord *Ellenborough*, certainly takes the distinction in that case, which has been so much relied on by the Defendant's counsel, that the allegation there was not made with a *prout patet per recordum*: that distinction, however, was certainly not adopted by the other Judges. Mr. Justice *Lawrence*, and Mr. Justice *Le Blanc* indeed, give it as their opinion, that that can make no difference in such a case, where the precise time of the fact proved by the record is not essential to the action; and that if the time were laid to be before the cause of action accrued, it would be sufficient, although it were not the exact day stated in the record, whether the allegation of the fact intended to be proved by the record, were with a *prout patet per recordum*, or not; because the day would be there immaterial. Now if that single distinction be taken out of the case of *Purcell v. Macnamara*, it is precisely the same case as that now before the Court; and the principle of the determination there applies closely to the objection taken here, and must decide it in the same way.

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But supposing for an instant, the words *prout patet per recordum*, to have the effect of making
certainty

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certainly of description of the record material, although without them it would be immaterial; I am of opinion, that this record would have proved the allegation as to the time when it states the judgment to have been given; for I think, that a judgment stated to have been recovered in *Hilary* Term, in the 2nd year of the reign of the King, would be sufficiently proved by a record of a judgment recovered in *Hilary* Term, the 1st and 2nd of *Geo. IV.* I am therefore of opinion that there is, in truth, no variance between the allegation and the record.

With respect to the fiction under which these judgments are nominally considered as of the first day of the Term in which they bear teste:—I think that we may notice judicially that fiction, and correct it by the fact, where it may become necessary to the justice of the case that we should do so. For instance, we may take notice that the judgment in this very case was in fact recovered in that part of the Term which was in the 2nd year of the reign of the King; and if an issue taken on that allegation of *nul tiel* record, had been tried before me, I should have held the allegation well proved by this record, for I should have considered myself at liberty, at least, if not bound to take notice of the fact, where it was necessary to obviate any mischief which would arise from the fiction. Giving all due force therefore to the words *prout patet per recordum*, I cannot but consider that if they have made strict accuracy of description of this record and of the time stated therein, as to the recovery
of

of the judgment by the Plaintiff, necessary to be alledged in the averment in this declaration, it would have been good and sufficient proof, the judgment having been recovered at the time stated in the allegation.

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GARROW, *Baron*. I am entirely of the same opinion with my brother WOOD, and for the reasons which he has ably and lucidly stated.

Per Curiam.

Rule discharged.

GENERAL ORDER.

1822.
Thursday,
23d May.

THE Court—being informed, where one party in a cause exhibits interrogatories before the Master, for the examination of the other party, pursuant to a decree or order of the Court, that if the examination of the party be deemed insufficient, it has heretofore been the practice to take exceptions to such examination, which have been set down to be argued before the Court—do consider such practice to be improper; and do order, that in future, in all cases where an examination shall be put in, to interrogatories exhibited before the Master, the party complaining of the insufficiency of such examination, do obtain an order to refer it to the Master

The party exhibiting interrogatories before a Master, for examination of the adverse party, cannot set down exceptions taken to the examination for insufficiency, to be argued before the Court, but must obtain an order to refer it to the Master, to review his report, and to report thereon, with liberty to except.

1822.
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**Master who settled the interrogatories, to look into and report to the Court, whether the same be full and sufficient or not, with liberty to the parties to except to the Master's report, if they shall be advised.**

## WHITEHOUSE and another v. HUDDEN.

1822.

Monday,  
6th May.

Venue.

*ABRAHAM* shewed cause against a rule nisi, which had been obtained by Sir *Wm. Owen*, to change the venue in this cause from *Middlesex* to *Somerset*, on the common affidavit.

The declaration was assumpsit for goods sold and delivered, with the common money counts. Venue, *Middlesex*. Allegation, Defendant indebted "in the county of *Stafford*," and in the common counts "in the county aforesaid."

Where a rule nisi had been granted for changing the venue, the Court would not discharge it on an affidavit stating that the cause of action arose in two *other* counties than that in which the venue had been laid; although the affidavit also stated circumstances to shew that fact and falsify the Defendant's (the common) affidavit, wherethe Plaintiff would not undertake to give material evidence in the county of the original venue.

Nor would the Court, under the circumstances, change the venue to the third county, although the declaration laid the *indebitatus* in *Stafford*, in the first count, and in the others "in the county aforesaid."

Statement by the Court of the general principles, and the ground of the practice in this respect in all cases.

The opposition to the rule was founded on an affidavit by one of the Plaintiffs, (therein described as of *Wolverhampton*, in the county of *Stafford*, Factor,) stating "that the cause of action arose in the several counties of *Somerset* and *Stafford*, that is to say, the Defendant, at *Frome*, in the county of *Somerset*, gave to the Traveller of Deponent, and his partner, (the Plaintiffs in this action,) orders for goods to be sold by the said Plaintiffs, who resided and carried on business, as the said Defendant well knew, at *Wolverhampton*, in the county of *Stafford*, to Defendant, and to be delivered to a carrier at *Wolverhampton*, to be forwarded to Defendant: and that Deponents did deliver to a carrier at *Wolverhampton* aforesaid, in

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said county of *Stafford*, for the use of said Defendant, the goods so ordered by said Defendant.

That upon account of the debt due from Defendant to Plaintiff, Defendant made his two several promissory notes in writing as follow, that is to say, one thereof dated *Frome, June 20, 1821*, whereby said Defendant promised to pay, two months after date thereof, to said Plaintiffs, or order, the sum of 10*l.* for value received, and appointed said note to be paid at No. 21, *Lombard Street, London*, and the other of the said notes, dated *Frome, July 12, 1821*, whereby the said Defendant promised to pay, three months after the date thereof, to said Plaintiffs, or order, the sum of 18*l.* for value received, and appointed the said last-mentioned note to be paid at No. 21, *Lombard Street, London*, and which said notes, when due, were severally dishonoured and returned to said Plaintiffs, and still remain in their hands due and unsatisfied. And this Deponent states, that such *notes are material evidence* for the said Plaintiffs in this cause.

Upon that affidavit it was contended that the venue could not be changed, the rule being, that, where it is sworn that the cause of action arose partly in one county and partly in another, the venue cannot be changed. Thus, therefore, on an affidavit stating that the cause of action arose upon a bridge called *King's Bridge*, partly in the county of *Kent*, and partly in the county of the city of *Canterbury*, the Court refused to change the

the venue, because the cause of action must have arisen *wholly* in the county to which it is sought to be changed,—*Herring v. Durant* (a).

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In this case further (it was urged), the Plaintiffs' affidavit had been falsified, and that alone was sufficient cause against making the rule absolute, the averment that the cause of action arose in the county to which it was sought to change the venue being necessary and indispensable for that purpose, and consequently requiring to be positively sworn to be true, and not contradicted. *Calland v. Champion* (b), *Collins v. Jacobs* (c), *Dick v. Burrish* (d). Where the cause of action is sworn to have arisen in several counties, the Court will retain the venue on the Plaintiff's undertaking in the alternative to give material evidence in some of them (e). In *Hunt v. Bridgeford* (f), this Court only required an undertaking to give material

(a) 1 Wilson, 178.

Mr. Tidd observes, in a note, p. 632, 7th edit. on the cases of *Collins v. Jacobs*,\* and *Dick v. Burrish*,† in the Common Pleas,—in the first of which it was determined that an affidavit, alleging that the cause of action arose in [that the goods were sold at,] a third county, was a sufficient answer to an application to change the venue to a second county, without an undertaking to give material evidence in the first county, that wherein

\* 3 Bos. & Pull. 579.

† 3 Taunt. 464.

the venue was originally laid; and in the last, that falsifying the Defendant's affidavit, as to the *whole* cause of action arising in the county to which it was sought to be changed, was a sufficient cause against changing the venue, and for retaining it,—that they "*seem* to have been since "*overruled*." Tidd's Practice, 632, 7th ed. (9th ed. 603.)

(b) 7 Durn. & East, 205.

(c) 3 Bos. & Pull. 579.

(d) 3 Taunt. 464.

(e) Tidd, 632, 7th ed. (9th ed. 612.)

(f) 1 Taunt. 259.

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evidence in one of two of the counties named in the Plaintiff's affidavit, the Court saying the *object* of the undertaking was merely to give such evidence as would shew the falsehood of the Defendant's affidavit.

So in *Neale v. Nevill*, *Savory v. Spooner* (g), *Powell v. Rich* (h), and *Smith v. Walker* (i).

It was also pressed, that, if changed, the venue should be laid in *Stafford*, upon the facts disclosed in the affidavit, and even in the declaration itself, where it was averred that the Defendant was indebted to the Plaintiff in the county of *Stafford*.

It was contended, in support of the rule, on the other hand, that even admitting the Defendant's affidavit to be contradicted by that of the Plaintiff, it was still necessary to resist the rule nisi for changing the venue, that the Plaintiff should undertake to give material evidence in the county wherein it was laid, citing *Price v. Woodhouse* (k).

It was also insisted, that notwithstanding the allegation in the Plaintiffs' affidavit, that the cause of action arose partly in two counties, other than that in which the venue had been laid, it was still contrary to the practice to change the venue in such a case. In *Wood v. Parkes* (l), where the

(g) 6 Taunt. 565; S. C. 2  
Marsh. 278.

(h) 7 Taunt. 178; S. C. 2  
Marsh. 494.

(i) 2 Moore, 64.

(k) 6 East, 433.

(l) 2 Barn. & Ald. 618.

venue had been changed from *London* to *Staffordshire*, on the usual affidavit, the Court would not bring it back on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and that a material witness resided in *London*, although the Plaintiff tendered an undertaking to give material evidence in one or other of those counties, holding it to be absolutely indispensable that the Plaintiff should undertake to give material evidence in the very county in which the venue was originally laid, in order to entitle himself to an order to bring back the venue; and the Court in that case justified their refusal of the application for a rule to bring back the venue, by the circumstance that no particular facts had been stated in the Plaintiff's affidavit, to shew that the affidavit of the Defendant was not correct. In the present case, it is not sworn that any material witness for the Plaintiff resides in *London*, nor are sufficient facts stated to falsify the Plaintiffs' affidavit.

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In *Emery v. Emery* also (m)—a case wherein all the authorities were reviewed and considered—the venue, laid in *Middlesex*, had been changed to *Stafford* on the common affidavit, and the Court refused to bring it back on an affidavit that the goods (which had been purchased by the Plaintiff on account of the Defendant) were partly paid for in *London*, and partly in *Surrey*, and had been sent into *Middlesex* to be forwarded

(m) 6 Price, 336.

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to the Defendant, the Plaintiff undertaking to give material evidence in *London* or *Middlesex*. In that case also the Court ruled that the Plaintiff must undertake to give material evidence in the county in which the venue had been originally laid (*n*). The Court there also stated, as a ground of their refusing to retain the venue in that case, that such a course would impose on them the necessity in all cases of inquiring on facts stated in affidavits whether any part of the cause of action arose in another county; and that it might be used as a device to compel a Defendant, where the cause of action arose in *Cornwall*, to try it in *Northumberland*, preventing him from changing the venue by showing that the cause of action arose partly in a third county, which, in consequence of the attendant expense and inconvenience, might make it prudent to submit to a false and vexatious demand.

In *Shirley v. Collis* (*o*), the Court (C. P.) said they would not change the venue where the cause of action (as was shewn) arose in two counties to a third county, "to which the record had been a stranger," although they said in that case that if the venue had been originally laid in the third county, they probably would not have changed it.

In *Henshaw v. Rutley* (*p*), where the Court brought back the venue on an affidavit showing

(*n*) See *French v. Coppinger*,  
 1 H. Bl. 216, accord.


(*o*) 1 Bos. & Pull. 940.

(*p*) 1 New Rep. 110.

that



that the cause of action arose partly in two counties, they discharged the rule nisi on an undertaking to give material evidence in the first county: and they required the same undertaking in *Clarke and another, assignees, &c. v. Reed* (q). So in *Hunt v. Bridgeford* (r), *Neale v. Nevill*, *Savory v. Spooner* (s), and *Smith v. Walker* (t).

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Such objections apply (it was urged) strongly to this case, as operating against the opposition to this rule for changing the venue, and for the retaining it in the county where it was first laid: and the rule of practice in these cases is imperative.

On the proposal for transferring the venue to the county of *Stafford*, it was insisted that there was no pretence for that further change, for that there was nothing in the Plaintiff's affidavit to induce the Court so to order. The Plaintiff might have laid the venue where he pleased in the first instance, subject to its being changed by rule of Court. He might have then, perhaps, properly laid it in *Stafford*, but he rejected that county himself, and chose the county of *Middlesex*. His own affidavit has also stated enough to show the Court that the proper county for the venue of his declaration is *Somerset*, where the goods were ordered and sold, and the notes dated.

(q) 1 New Rep. 310.

(r) 1 Taunt. 259.

(s) 6 Taunt. 565. 2 Marsh.  
 278. S. C.

(t) 8 Taunt. 169. S. C. 2

Moore, 64.

Motion there, after plea  
 pleaded.

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The allegation, that Defendant was indebted in the county of *Stafford*, was of no moment.

In *Sutton v. Fenn* (u) it was determined on demurrer that the words “the county aforesaid,” in the body of the declaration, must be taken to have general reference to the county named in the margin, and not to a county named incidentally in the declaration. It was the county in the margin which determined the venue till changed by the Court.

For these reasons it was contended that the rule nisi should be made absolute for changing the venue from the county of *Middlesex* to that of *Somerset*.

*Per Curiam.*

There are certainly very few matters of more consequence in practice, with reference to the result to the parties, as it respects the convenience and expense to either or both, than that of the question of changing or retaining the venue of actions in suits at law; and it is not unfrequently a matter which may, directly or collaterally, materially affect the justice of the particular case. It is therefore obviously of the highest importance that it should be clearly ascertained and fully settled by rules, or by a fixed course of practice in all the Courts. We cannot, therefore, regret that some time should have been occupied in an

(u) 3 Wils. 339.

investigation

investigation occasioned by such a discussion as the present, where the subject has a tendency to contribute to the examination and settlement of so material a point as the propriety of laying the venue, and the grounds on which it should be changed or retained, and the mode of effecting either.

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Many of the cases on this subject either clash, or at least are not easily reconcilable with each other, and that, which is always unfortunate, is greatly so in such a matter, and much to be regretted here.

With respect to the present case, which has certainly been discussed at great length, though not improperly or unnecessarily so, but with good reason and on useful research, we are of opinion that the affidavit, on which we are required to retain the venue, does not sufficiently warrant us in doing so.

The cases on this point have been very fully brought before the Court. There is nothing in the general principle of the practice deducible from them, in respect of the rules as to changing the venue, to enable us to reject the application of the Defendant and accede to that of the Plaintiff, as attempted to be supported on either side by the affidavits in one case or the other.

It has now long been the course for the Court to order a change of venue on what is now termed the

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the usual or common affidavit, and that being so, it should require a very satisfactory affidavit on the other side to ground the opposition to that order, whether the object of the Plaintiff be to retain the venue or to transfer it still further to a third county.

Unquestionably wherever it can be clearly shewn to the satisfaction of the Court that the justice of the case requires a change of venue; or the convenience of one party, without inconvenience to the other, may make it desirable; or that it would be a saving of expense to both, or to either, without inconvenience or expense to the other, the Court should and would undoubtedly order a change of venue with that view and to effect so reasonable an object. For the same reasons they would retain it, or would bring it back, or change it again to a third county, if necessary or expedient; but in all these cases their discretion must be guided by a satisfactory affidavit of facts in support of the application, the matter being in all cases matter of discretion with the Court, directed certainly by precedents in practice.

To retain the venue in the present instance, on the plaintiff's affidavit, would be to overturn the established course of practice.

Rule absolute.

IN

## IN THE EXCHEQUER CHAMBER.

## Error from the Court of King's Bench.

CLEMENT v. LEWIS, Gent. (one, &amp;c.)

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Tuesday,  
30th April.  
Saturday,  
18th May.

THE Writ of Error, on which the following argument and determination were founded, was brought

An account published in a newspaper of proceedings in a Court of Law, containing matter redounding to the discredit of a person in his business of an attorney at law, is, whether true or false, rendered actionable as libellous by the paragraph being headed or introduced with the line "Shameful conduct of an Attorney."

Pleas, by way of justification, therefore, in such a case, averring that the supposed libel contained a faithful and true account of the proceedings in a Court of Law, were determined to be bad pleas, by reason of the preceding words.

Affirmed on Writ of Error.

The Jury having found a verdict for the Plaintiff in the action on the issues joined upon the plea of not guilty, and also on the second and sixth special pleas, without assessing damages, and having found for the defendant in the action on the other issue as far as it related to all the other five special pleas, the Court below ordered judgment to be entered for the Plaintiff on the issue upon those pleas, *non obstante veredicto pro Defendente*.

The verdict found for the Plaintiff in the action on the first issue joined on the plea of not guilty, and on the second issue in so far as it related to the second and sixth special pleas by way of justification, held to be imperfect by reason of the omission on the part of the Jury who tried the issue to assess the damages, and therefore void.

Affirmed.

The Court below having also awarded a writ of inquiry to assess the unassessed damages on the issues found for the Plaintiff below, whereupon judgment was afterwards entered up for the damages found by the inquisition; the judgment of the Court of King's Bench in that respect was annulled for error in awarding writ of inquiry, and the final judgment reversed.

Such omission on the part of the Jury is not to be supplied by a writ of inquiry, because the Defendant would thereby lose his right to the remedy by attain for a finding of excessive damages.

The Defendant to the action therefore held to be entitled to a *venire de novo*, by reason of the void verdict for want of assessment of damages as to the issues found for the Plaintiff.

[Since this decision, see 6 Geo. 4, c. 50, s. 60, abolishing the process of attain of Juries.]

*Semble*, the Judge before whom the issues were tried should have directed the attention of the Jury to the question of damages on the finding for the Plaintiff.

*Practice.*

The course of practice in such cases, to correct the erroneous proceeding of the Court below, is to remit to them the record, requiring them "anew" to command the Sheriff to cause a Jury to come, &c. to try (&c. the issue and part of issue found for the Plaintiff.)

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brought by the Defendant below, an Attorney at Law and Solicitor, upon a judgment given by the Court of King's Bench in an action brought by the Defendant in error against the Plaintiff in error, the Proprietor of the Observer Sunday newspaper, for damages by reason of a libel published in that paper regarding the Plaintiff below, and calculated to injure him in his character as an Attorney (a).

The alleged libel formed a paragraph in the Observer newspaper. It was headed after the usual manner of such things by a conspicuous line at the top, containing the words—" *Shameful conduct of an Attorney.*" Then followed the paragraph, which was a statement professing to be an account of certain proceedings which had taken place in the Court for the Relief of Insolvent Debtors, involving charges affecting the professional conduct and character of the Plaintiff below.

The declaration consisted of two counts, in the first of which the whole of the libel was set out; and in the second, parts only. The Defendant below pleaded ten pleas: first, not guilty to the whole declaration, on which issue was joined: secondly, four special pleas of justification to the first count, for that the supposed libel contained a faithful and true account of the several proceedings therein stated which were had in the Insolvent Debtors' Court—a public Court of Justice of our Lord the King; and lastly, five similar

(a) See 3 Barn. & Ald. 702.

pleas

pleas to the different parts of the libel set out in the second count of the declaration.

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Replication to the nine last pleas, that the Defendant below, of his own wrong and without any of the causes by him in those pleas mentioned, committed the grievances as the plaintiff below had above thereof complained against him, on which issue was joined.

At the trial the Jury found a verdict for the plaintiff below on the plea of not guilty:—

As to the last issue, so far as the same related to the matters contained in the second and sixth pleas, that the Defendant below, of his own wrong, and without the causes by him in those pleas mentioned, committed the grievances in manner and form as the Plaintiff below had complained against him:—

And so far as the last issue related to the matters contained in the third, fourth, fifth, seventh, eighth, and last pleas, that the Defendant below did not of his own wrong, but did, for the causes in those pleas mentioned, commit the several grievances in that behalf, in manner and form as therein alleged.

The Court of King's Bench, on an application by the Plaintiff below, that he might have judgment, notwithstanding the verdict found for the Defendant below on the seven special pleas, on the ground

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ground that such pleas were insufficient in point of law, decided that they were so, because the words "Shameful conduct of an Attorney," which prefaced the statement, formed no part of the proceedings in the Insolvent Debtors' Court, the Defendant had taken that allegation upon himself, and consequently that the Plaintiff below was entitled to judgment notwithstanding the verdict.

They thereupon awarded a writ of inquiry to assess the damages he had sustained, which were accordingly assessed at 500*l.* and 40*s.* costs, whereupon final judgment was afterwards entered up for these sums, as well as 656*l.* for costs of increase, amounting in the whole to 1158*l.*

The Defendant below brought the present writ of error in this Court, and assigned for errors that the declaration was not sufficient in law for the Plaintiff below to sustain his action against the Defendant below; that notwithstanding the Jurors of the first mentioned Jury had found on the last issue, so far as the same related to the matters in the third, fourth, fifth, seventh, eighth, and last pleas, that the Defendant below did not of his own wrong, but for the causes in those pleas mentioned, commit the supposed grievances in the declaration alleged, in manner as the Defendant below had in those pleas in that behalf alleged. Yet that judgment was given for the Plaintiff below against the Defendant below, whereas the judgment ought to have been given for the Defendant below against the Plaintiff below.

Joinder



Joinder in Error.

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Of the two questions raised in this case, the first was argued and disposed of in the preceding term.

In support of the errors assigned, it was then contended by *Platt*, that the judgment of the Court below could not be sustained; and three substantive objections were made.

*First.* That the matter, of which the alleged libel consisted, was not libellous or actionable, as such, in point of law, being nothing more than a true and faithful account of the proceedings of a public Court of Law, the publication of which was lawful and useful.

*Secondly.* That there was nothing in the mode or terms of the narration of those proceedings, which could have the effect of converting a published account of them, which would otherwise be privileged and legal, into an illegal and actionable act, unprotected by such privilege.

*Thirdly.* That failing both those propositions, the pleas put on the record by the Defendant, in bar of the Plaintiff's action, had established a sufficient defence, and answered the action or justified the act.

A fourth objection was taken to the judgment, founded on an erroneous course of proceeding on the

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the part of the Court below, in that the Court of King's Bench had awarded a writ of inquiry to assess the damages of the Plaintiff below on giving him judgment *non obstante veredicto*, whereas the only course in practice which could have been correctly adopted in that case was an award of a *venire de novo*.

Upon the first three points it was urged, that to fix a paragraph of this description with a character which would make it actionable at law, it must be shewn to be an untrue account, or at least a misrepresented account, of what did take place on the alleged occasion; and that it was necessary that the matter published should be proved to be false and malicious.

In this case, which was an action for the recovery of damages for civil injury, proof of the falsehood of the statement was indispensably necessary to the maintenance of the suit; because, unless the statement could be shewn to be false, the Plaintiff could not establish a case of legal injury sustained by the publication. In criminal prosecutions, where the object was to repress whatever might tend to a breach of the public peace, by exciting irritation and quarrel, the falsehood of a libel was immaterial.

DALLAS, *Chief Justice*.—These general propositions may be very well passed by, for the present confine yourself to what the Court have decided, which we are here to examine. The question brought

brought before us is, whether, supposing the account to be true—which you may assume for the purpose of your argument, though we give no opinion on that—the Plaintiff in Error has not by the heading which is given to the paragraph gone beyond the proposed statement of the proceedings before the Insolvent Debtors' Court, of which it professes to give an account, and whether by so doing, whereby he has added matter confessedly forming no part of the proceedings, he has not made that matter libellous and actionable, which but for that may not perhaps have been so?

On that, however, it is not necessary that we should now for the present give any opinion, and we are desirous to be understood as giving none, in permitting it to be assumed solely for the sake of the argument.

**Assuming the publication to be privileged and permissible, still if the introductory heading of the paragraph be not justifiable, the pleas by way of justification are bad.]**

On that point then it was submitted, that the heading line of the article abstractedly and standing alone was harmless; and read with the paragraph, taking the whole together, it carried the statement no further and added nothing to it. It imputed no misconduct to the Plaintiff below, further than the statement made him culpable. The line was merely the usual mode of directing

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attention to the paragraph, stating the subject matter of the article by way of title.

It was further submitted, that the Jury had by their finding clothed the whole of the paragraph, including the heading, with the privilege conceded to such publications, and their verdict had made the justification a good and sufficient bar to the action, by pronouncing the account to be as pleaded, a full, true, and faithful account of the proceedings in the Insolvent Debtors' Court, which amounted to a complete answer to an action for a civil injury of this nature, which could only be maintained by proving the matter complained of to be a falsehood, being of the very essence of the Plaintiff's action and the sole foundation of his right to damages.

*Per curiam.*

In truth, the words are here introduced into the body of the paragraph which constitutes the libel, and are not merely confined to the leading line or title, and thus form part of the libel itself, if it were necessary to lay any stress on that.

We have no doubt that the objectionable matter imports sufficiently that the conduct of the attorney was shameful, and that it is not covered by the pleas on this record.

We are therefore of opinion, that on that point  
the

the Judgment of the Court below is right: and  
that it must consequently be

Affirmed.

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The other point now came on for argument, when it was insisted on the part of the Plaintiff in Error, that the Jury not having assessed the damages on the inquisition, the only means of supplying that deficiency was by awarding a new *venire*; and that it could not be supplied by a writ of inquiry of damages addressed to another Jury, as had been done in this case.

The course in that respect is governed by the rule laid down in *Comyns's Digest* (b), “ that in all  
“ cases where *the issue* is tried by *a Jury*, and  
“ damages are recoverable, the damages ought re-  
“ gularly to be assessed by *the Jury*; and if they  
“ do not where damages only are recoverable the  
“ verdict shall be void, and the omission cannot be  
“ supplied by a writ of inquiry.” The reason for that impracticability is then given, which is this,  
“ for thereby the Defendant shall lose the benefit  
“ of a writ of attain, if the damages are exces-  
“ sive.” So that where the Court may inquire if any thing in respect of which no writ of attain lies, a writ of inquiry may be awarded and will serve, otherwise there must be a *venire de novo*, and a writ of inquiry cannot be given.

In *Cheyney's case* (c), 3d resolution, the rule is

(b) Tit. “*Damages*,” (C. 1). Rolle's Abr. (Trial,) 722, pl.

(c) 10 Rep. 119. See also 14, 15, 16.

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broadly laid down—it is said to be that when the Court *ex officio* ought to inquire of any thing upon which no attaint lies, then the omission of it may be supplied by a writ of inquiry of damages, as in the said case of *quare impedit*, to inquire of the said four points, for of them no attaint lies, as is held in 11 *Hen. 4*, c. 80, *because as to them the inquest is but of office*; but in all cases where any point is omitted whereof attaint lies, there it shall not be supplied by a writ of inquiry of damages, upon which no attaint lies.

In *Heydon's case* (*d*) also the same rule is laid down, and the same distinction taken that the writ to inquire of damages is but an inquest of office, and no attaint lies.

In *Eichorn v. Le Maitre* (*e*) it was held, that a writ of inquiry could not be awarded to supply the omission of a jury in not finding damages but that a *venire facias de novo* must go, for where a man may have attaint there no damages shall be assessed by the Court if they be not found by the Jury.

The distinction has been taken to be, that where the Jury find an immaterial issue and no other, they are not to assess damages, but when a material issue is found for a plaintiff, the same Jury must assess the damages. In this case all the issues found were material, and damages ought to have been assessed. The legal consequence would be, that if the damages had been

(*d*) 11 Rep. 6 a.

(*e*) 2 Wils. 367.

assessed,

assessed, a writ of attaint would lie for an excessive assessment, and the Defendant cannot be ousted of that remedy by the substitution of a writ of inquiry, which is only an inquest of office. Being entitled therefore to a formal writ of *venire facias juratores de novo*, and the Court not having awarded it, it was insisted to be error on the record, and, consequently, the judgment could not be maintained.

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*Marryatt*, for the Defendant in error, *contra*—admitting that in general, as matter of practice, the Jury who try the cause are bound to find by their verdict every thing which should flow from a finding for the Plaintiff as a necessary consequence of such a verdict, and that if they do not, the particular omission cannot be supplied by a writ of inquiry—still contended, that where the omission was of something collateral to the finding, and did not form a necessary part of the verdict, the defect might be well supplied by a subsequent writ of inquiry of damages in aid of the verdict.

In this case, it was submitted, the Jury were not necessarily bound to find the amount of damages as part of their indispensable *duty*. They have, in point of fact, omitted nothing that they ought and were bound to have found, and, consequently, a writ of inquiry of damages is the convenient and practicable course to supply that accidental omission.

The result of the pleadings has been a finding  
for

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for the Plaintiff below, on the general issue of not guilty. Then they have found for the Defendant in the action on six of the eight special pleas pleaded by way of justification, and for the Plaintiff on the two other special pleas of justification. They were, therefore, precluded from finding the amount of damages, or at least it was not part of their duty to do so; and the damages on the three pleas found for the Plaintiff in error could not well be assessed so long as there was on the same record a finding for the Defendant.

He distinguished from the present case the cases which had been relied on in support of the assignments of errors, in that there was in each of those something left unfound by the Jury which they had been in duty bound to have found as part and parcel of their verdict, and without which their finding was incurably and irremediably imperfect and void, but here the objection to the finding is made *matter of error*.

In *Cheyney's case*, where issue was taken upon the tenure on a writ *de valore maritagii*, the Jury did not inquire of the value of the marriage as they clearly ought to have done, and they would have been attainable if they had found excessively.

There are other cases wherein the Jury have only a mere power, as in avowries for distress, and in *quare impedit*, where by statute the Jury ought to inquire of the value of the living, &c. the four  
usual



usual points, and some others, where the Jury may assess, but if they do not, the omission is not an irremediable defect, and the Courts may supply it by a writ of inquiry.

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[BURROUGH, *Justice*.—In *quare impedit* it has been decided otherwise, I apprehend.]

In *Pryner v. Charlton* (*f*) where the Jury, by negligence of the Plaintiff and his Counsel, had not been charged to inquire of three of the usual points, if church full, &c. so that no judgment could be given, a special writ of inquiry of damages was awarded.

In *Eichorn v. Le Maitre* issue was taken on an alleged misnomer raised by plea in abatement. The Court there held, that the Plaintiff was entitled to his judgment peremptorily, and that it was immaterial whether the plea was merely a plea in abatement or in bar. There the Jury having found a verdict generally for the Plaintiff, they were bound also to assess the damages as a necessary consequence of the finding, the damages being the entire object of the writ and suit, and there being nothing to prevent the assessment, the whole cause of action being found for Plaintiff. Here the Jury have found partly for the Plaintiff and partly for the Defendant, finding on some issues for one and on some for the other of the parties.

(*f*) Dyer, 135, fol. 12.

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In that case the Court did not say that a writ of inquiry would be error, but that the writ of *venire de novo* should be awarded, in order that if outrageous damages should be awarded by the Jury who found the verdict, the Defendant might have an attaint.

To have assessed the damages in this case would (it was submitted) have been an assessment of possible damages, as they would have been merely contingent, and subject to the controlling revision of the Court, or to their ultimate decision as to the validity of the pleas by way of justification..

[WOOD, *Baron*.—The damages might nevertheless have been found and ought to have been assessed. There would have been no inconvenience in it, for if the Court should ultimately hold the pleas, by way of justification, to be bad, the Plaintiff would have been entitled to his verdict as found, so that in truth there would have been no contingency, and in fact it is very common in practice, and is found to be very useful in the result.

BURROUGH, *Justice*.—In *Sayre v. The Earl of Rochford* (g), a verdict was found by the Jury for the Plaintiff upon the first issue of not guilty to false imprisonment, and for the defendant on three special pleas by way of justification, and there the damages were also found and assessed at 1000*l*.

(g) Bl. Rep. 1165.

*subject*

*subject to the opinion of the Court on the point of admissibility of a portion of the evidence.]*

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The argument founded on the course of an assessment of the damages being by writ of inquiry, depriving the Defendant of his remedy by writ of attain, was treated as one which the Court would not estimate or regard at the present day, when the writ and process of attain had been altogether denied and abandoned for more than 200 years, and the doctrine had become obsolete (*h*), having been for so long a period wholly superseded by the modern and more efficient substitution of the course of moving for a new trial.

[BURROUGH, *Justice*.—If the Jury had assessed the damages in this case, and had found excessively, it is clear they would have subjected themselves to an attain, and the Defendant ought not to be deprived of that remedy, although he may have other modes in practice of obtaining redress.

DALLAS, *Chief Justice*.—We cannot treat it as obsolete, the remedy is still available to parties, although in modern times not resorted to. Certainly the Courts are not to deprive the party of his remedy, by so moulding their course of proceeding on the part of a Plaintiff as to have that effect. Whenever a Jury may be subjected to attain, their liability must be preserved to the party injured, however remote the probability of

(*h*) See 6 Geo. 4, ch. 50, sect. 60.

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recurring to the remedy. It is therefore an objection to the mode of proceeding by writ of inquiry.

BURROUGH, *Justice*.—In the case of *Kynaston v. The Mayor of Shrewsbury* (*i*), it was determined, that an omission by the Jury to find damages on a traverse of the return to a writ of mandamus, could not be supplied by awarding a writ of inquiry.]

That, it was submitted, was so held, because the traverse of the return to a mandamus was given in those cases by the statute of the 9th of *Anne*, ch. 20, in lieu of the action for a false return, and there, as the damages are a necessary consequence of the issue, they must of necessity be found by the Jury, as a material and indispensable part of their verdict. In the case of *Barker v. Sir Wolston Dixie* (*j*), where it was determined that smallness of damages afforded no ground for a new trial, the Court recognised the substitution of the mode of proceeding by application for new trial for the old process of attain, and decided, that where the Jury did not find a false verdict, attain would not lie, although the damages might be wrong. *Fitz.* 105, 106, two contrary opinions.

The following cases, in which writs of inquiry had been awarded to supply the omission of an assessment of damages by the Jury who tried the cause, where a verdict had been found for the

(*i*) 2 Stra. 1052.

(*j*) Ibid. 1051.

Plaintiff,

Plaintiff, and the damages had not been assessed, on account of the verdict not applying to the very point at issue, or to an immaterial issue, or from some defect in the pleadings on the record, were then cited.

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In *Lacy v. Reynolds* (*k*), the damages on verdict for Plaintiff, in an action for words, could not be assessed, because there was a misjoinder, and there a *new writ* was awarded to assess the damages. In 2 *Rolle's Abridgment*, 99 D.(*l*), the form of an entry of such a writ on the record is given "action for words."

[PARK, *Justice*.—That does not import a writ of inquiry. The words are a new writ to inquire of damages, novel venire.]

Meaning (it was submitted) a new writ of inquiry, or it might be without end to no purpose.

[BURROUGH, *Justice*.—Lord *Coke* says, all the precedents cited there against those rules, passed *sub silentio* without the advice of the Court, and against the rule of law.

DALLAS, *Chief Justice*.—And therefore (it is said there) in detinue, if the Jury find damages and costs, and no value, as they ought, it shall not be supplied by a writ of inquiry of damages, for the reason aforesaid; and therefore,

(*k*) Cro. Eliz. 214.

(*l*) Title Judgment, p. 99, pl. 1.

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by the Rule of Court, a new venire facias was awarded.

BURROUGH, *Justice*.—The Court treated it as a judgment by default.]

In *Jones v. Bodinham* (*m*), a writ of inquiry was awarded, because the verdict being given on an immaterial issue, the Jury could not assess damages.

[GRAHAM, *Baron*.—There was only one issue in that case.

WOOD, *Baron*.—A single issue immaterial stands for nothing.]

In *Brome v. Rice* (*n*), the point was the same as here. The cause of action was confessed, and on an issue taken afterwards, and verdict for Defendant, the Court set it aside, ordering judgment for the Plaintiff, and they awarded a writ of inquiry of damages. So also in *Craven v. Hanley* (*o*).

In *Broadbent v. Wilks* (*p*), judgment was entered up for the Plaintiff in trespass, notwithstanding a verdict for the Defendant, on a justification, the plea being bad in law. It was there insisted, that as the *whole* verdict could not be set aside, because there had been two counts, and one issue

(*m*) 1 Salk. 173; Carthew, 370, S. C.

(*n*) 2 Stra. 873.

(*o*) 2 Com. Rep. 548; Barnes, 255, (186).

(*p*) Willes, 364.

found

found for the Plaintiff and one for the Defendant, there must therefore be a venire de novo, but the Court gave a writ of inquiry, allowing the Plaintiff to enter up judgment then or afterwards.

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[RICHARDSON, *Justice*.—There was only one plea there to the whole body of trespasses, making it as an interlocutory judgment on confession of the Defendant: and that brings it within the class of cases already cited, leaving it open to the same observation as has been made on those.

BURROUGH, *Justice*.—Shew us how you can get interlocutory judgment here. It is confined to the point on which the Court gave interlocutory judgment.]

In *Kirk v. Nowell* (*q*), in trespass on not guilty, and three pleas of justification, judgment was entered for the Plaintiff on the general issue, and two pleas justifying the trespass, notwithstanding a verdict was found for the Defendant on the fourth, being insufficient in law; and from the manner in which that case was ultimately disposed of (*r*) on the question of costs, it appears that there must have been a writ of inquiry of damages awarded in that case.

[WOOD, *Baron*.—According to my recollection of that case, it was otherwise. It certainly came down to the assizes in some shape or other, but

(*q*) 1 Term Rep. 118.

(*r*) 1 Term Rep. 266.

whether

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whether the damages were assessed before a Jury or Judge I cannot tell. The motion respecting the costs was founded on the point that the Plaintiff was not entitled to costs on all the issues, where he had succeeded on the whole case, merely because one plea was held bad, but I am quite sure that the point respecting the assessment of damages never came before the Court.]

Where there is a demurrer to evidence, the damages may be assessed by the Jury conditionally, or the Jury may be discharged without such assessment; in which case the damages on the determination of the demurrer, if in favour of the Plaintiff, must be by a Jury under a writ of inquiry to be awarded. *Buller's Nisi Prius* (s).

[WOOD, Baron.—Cases of demurrer to evidence do not apply here, because a Jury cannot assess damages on a demurrer to evidence.]

It was submitted that they might or might not. In *Davison v. Newbott* (t), the Jury being discharged upon a demurrer being joined upon evidence, a writ of inquiry of damages was awarded, and (the reporter observes) it was said by the Court, if these precedents be good law, then it may be inquired of by the same Jury conditionally. But it may be as well inquired of by a writ of inquiry of damages when the demurrer is determined, and the most usual course is, when

(s) 133, 134 (7 ed. 313).

(t) Cro. Car. 143.

there



there is a demurrer upon evidence, to discharge the Jury without more inquiry.

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[GRAHAM, *Baron*.—Where the demurrer to evidence is overruled by the Court, it is a judgment by the Court, and a writ of inquiry, if for Plaintiff, must be awarded to assess the damages.

WOOD, *Baron*.—Every issue here is a separate thing, and each must be found by the Jury, and may be separated by the verdict; but they were bound, *ex officio*, to assess the damages.

BURROUGH, *Justice*.—The broad ground is, where the Court decide on the law, the Court may assess the damages, but whenever there is a verdict, the Jury must assess the damages as a necessary part of their finding.]

It was then put that where questions of law and of fact are determined, and no doubt remains undisposed of on either, the damages only remain to be assessed, and where, since the statute, the issue found for the plaintiff covers the whole case, a writ of inquiry may be awarded to assess the damages, and that is the proper and convenient course. Where the Jury have therefore in any manner, and upon any occasion, disposed of the whole case, and concluded the parties by their verdict, there may be a writ of inquiry if they have not assessed damages. Where one issue is found for the Plaintiff, and another for the Defendant, the finding for the Defendant may have the

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the effect of repelling the Plaintiff's whole cause of action, and there it would be wrong for the Jury to assess damages, and, in fact, it is never done on issues found for the Plaintiff, where issues are also found for the Defendant.

[WOOD, *Baron*.—In practice it certainly is not usually done, but it might, and I think always ought to be done. In this case, if it had been tried before me, I should have considered it my duty, with reference to these bad pleas, to have called the attention of the Jury to the damages, with a view to the result which has awaited this verdict. I know that such a course is not often adopted, and that the matter is not noticed at *nisi prius*, but I consider it an oversight and omission.

BURROUGH, *Justice*.—In *Sayre v. Lord Rochford* (u), already mentioned, that was done, as I well remember, for I was present. The Jury assessed the damages on the general issue, notwithstanding they found a verdict for the Defendants on all the pleas by way of justification, which they referred to the opinion of the Court as to the evidence by which they had been supported, and on which they founded their verdict for the Defendant.] (Bar mistaken.)

In the case of *Knight v. Lillo* (x), to trespass for breaking Plaintiff's close, and treading and eating grass, the Defendant pleaded three pleas, not

(u) *Supra*, 194.

(x) 2 Wils. 81.

guilty,

guilty, to the whole declaration, and two justifications in bar of prescription of right of entry to kill game. Verdict for Plaintiff on the first plea, and for the Defendants on the two special pleas. Thereupon an application for judgment *non obstante veredicto* upon the whole record, as both the prescriptions were bad in law, the Court, because the Plaintiff had a verdict on the general issue, and one of the trespasses was not covered by the justifications, whether bad or not, would not give him judgment on the whole record, as he was already entitled to judgment on the general issue.

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So here it was urged, the Plaintiff below being entitled to judgment, there could be no necessity for a *venire de novo*, which would make it necessary to retry all the issues, to the great expense and disadvantage of the Plaintiff in the action, without a shadow of benefit to the Defendant, whilst a writ of inquiry would obviate every difficulty.

[BURROUGH, *Justice*.—Such a mode of proceeding would in every case have the effect of giving a Plaintiff the advantage of a choice of two juries, and if he should prefer to have his damages assessed by a Sheriff's Jury, he might avail himself of that course by not suffering the Jury, who tried his cause, to assess the damages.]

Reply was dispensed with, the Court being unanimously of opinion that the award of a writ of inquiry was not to be supported.

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DALLAS, *Lord Chief Justice*.—It is quite plain that the course to be pursued in this case should have been an award of a writ of venire de novo. The question now made was not raised in the Court below, and they have improvidently awarded a writ of inquiry of damages.

The Defendant would thus lose his remedy by writ of attain; and it is clear, from the case in 2 *Wilson*, that the law still attaches consequence to that process.

The only difficulty we have is as to the course to be adopted for our correcting the proceeding of the Court of King's Bench in that respect. This Court cannot award a venire de novo, but we may remit the record to the Court below, in order that they may do so. In the meantime, we will consider of the form of the judgment necessary for the purpose of effecting the object.

A question was then made whether the whole record should be sent back to a Jury, or only the issues found for the Plaintiff.


The Counsel for the Plaintiff in error submitted that the whole record should be the subject of the venire de novo, citing *Lumley v. Payne* (y), where, in *ejectione fermæ* against baron and feme, the

(y) 2 Rolle's Abr. 722, Trial, pl. 18. See also Sheffield's case in Scacc, ib. pl. 19, where on several issues some found

well, and others imperfect, venire facias for the whole, and the Jury may find contrary to first finding.

Jury,

Jury, on plea of not guilty, found for the feme generally, and gave a special verdict as to the baron. The Court having adjudged the special verdict insufficient, a venire facias de novo was awarded as to both the feme and the baron; and upon this new writ the feme might be found guilty, because the record and issue is entire, and because the verdict is insufficient in the whole and void, and the matter being moved in arrest of judgment, the clerks said that it was their course to grant the venire facias de novo for all.

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RICHARDSON, *Justice*.—I have much doubt whether, the judgment being an entire thing, the venire de novo can be awarded for less than the whole.

WOOD, *Baron*.—It may go on all the issues not held to be bad, and on which the damages should have been assessed.

GRAHAM, *Baron*, and PARK, *Justice*, adverted to the cases of *Lucena v. Craufurd* (z) and *Kynaston v. The Mayor, &c. of Shrewsbury* (a), as to the practice.

Adjourned for consideration of the form of judgment.

The Court having deliberated on the point of form to be adopted in framing the entry, ulti-

(z) New Rep. 329.

(a) *Ubi supra*.

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mately ordered their judgment to be entered specially in the following terms.

It appears that notwithstanding the verdict found for the Defendant, still the Plaintiff ought to recover damages.

But it further appears to the Court, that the Jury, by whom the issues were tried, ought to have assessed the Plaintiff's damages, by reason of the grievances contained in the declaration; and by reason of their not having assessed such damages, the verdict for the Plaintiff on the first and last issues, so far as relates to the second and sixth pleas, is void in law.

It further appears, that in the record and proceedings, &c. there is error in this, that the Court of King's Bench have awarded a writ of inquiry, and proceeded to final judgment thereupon; therefore, it is considered that the verdict and the inquisition of damages be annulled and vacated, and the final judgment in the King's Bench be reversed; that the record be remitted to the Court of King's Bench; and that the same Court do anew command the sheriff to cause a Jury to come, &c., to try the first issue and the said other issue so far as relates to the second and sixth pleas.

Judgment affirmed on first point:  
reversed on the last.

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## WILLET v. CLARKE,

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Wednesday,  
15th May.Vendor and  
Vendee.

ON motion of *Tindal* for the Defendant (27 April) it was ordered, that the Plaintiff shew cause (on 7 May) why the verdict obtained by the Plaintiff in this cause should not be set aside and a nonsuit entered, or why the judgment should not be arrested.

The action was trespass on the case upon promises. For that a certain dwelling-house was sold by auction, as being late the property of a bankrupt, by his assignees, under the following conditions:—The highest bidder to be the purchaser, to pay a deposit of 20% per cent. and sign an agreement to pay the remainder on having a good title; to be entitled to possession on payment; to accept the usual transfer then adopted at *Stowmarket* upon purchases of such copyhold property; to pay the expense of conveyances, &c.; failing, the deposit on the purchase money to be forfeited to the vendors as liquidated damages, and the estate to be resold, and the expense to be made good by the defaulter; that at the said sale the Plaintiff, by one *Wm. Green* his agent, became and was declared to be the purchaser. And that on 1st May, 1819, the plaintiff,

by

years after the day when the money should have been paid, “afterwards” being the substance of the averment, the time under the verdict being immaterial.

It is no answer to an action at Law for nonpayment of the remainder of purchase money agreed to be paid to the vendor on his executing a bond conditioned to cause the title to be completed and the premises to be conveyed to the vendee, that he, the vendor, purchased the estate sold at a sale of the property of a bankrupt, whose assignee he was.

Time is not of the essence of such a contract.

Nor is it an objection to the action that the bond was not tendered to the obligee till two years after the time when the money was to be paid by him.

*Pleading.*—It is not a ground for arresting the judgment, that such a tender is averred in the declaration to have been made afterwards, viz. on the (&c.) two

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by articles of agreement of that date, between himself and Defendant, agreed for the sale of said premises by Plaintiff to Defendant for 900*l.*, subject to said conditions of sale ; that Plaintiff, in consideration of 300*l.* paid on execution of the said agreement, and 600*l.* further to be paid to plaintiff *on the day specified in the said conditions of sale*, with 5*l.* per cent. interest thereon, until the premises should be duly surrendered or conveyed according to the conditions of the said sale.

The declaration then set forth another agreement between the parties, of the 5th of *June* following, reciting that certain differences had arisen between them respecting the meaning of the former agreement, for the ending whereof it was agreed, that Defendant should become the purchaser of all the brewing utensils on the premises, except as therein mentioned, for 100*l.* to be paid to the assignees of the bankrupt on the 7th *June*, upon their agent being withdrawn from possession of the premises ; Defendant thereby agreed *to pay to Plaintiff the 600*l.* residue of the purchase-money under the first agreement, with interest from the date thereof, upon Plaintiff making a good title to the said premises, OR otherwise if such title should not be THEN completed, UPON the said Plaintiff executing, at his own expense, a bond to complete such title, and to convey the said estate as soon as the same should be completed ; averring undertaking to perform agreement by Defendant in consideration of performance by Plaintiff ; that*  
although



although Plaintiff was ready and willing before and *on the said 25th day of December, 1819*, and always had been, to *cause* the said title to the said estate and premises to be completed, and that the estate and premises should be conveyed to Defendant on the terms aforesaid; yet the said title was not complete before and on *said 25th December*. And thereupon, the said title so remaining incomplete as aforesaid, and the said sum of 600*l.* not being paid to Plaintiff, Plaintiff afterwards, *17 October, 1821*, at his own expense, caused to be prepared and he duly executed bond (&c.) purporting that he became bound to Defendant in the penal sum of 1200*l.* under and subject to a certain condition, whereby it was declared, that if the Plaintiff or his heirs did and should at his cost and charges, when the same should be completed, and without any unnecessary delay, make out and deduce a good title to the said messuage or tenement and premises; and also if the said Plaintiff and his heirs, and all other necessary parties, did and should, when and so soon as a good title could be completed to the said messuage &c. as aforesaid, at the costs and charges of the said Defendant, his heirs or assigns, convey, surrender or otherwise assure or cause (&c.) such conveyances being prepared by the Defendant, his heirs, or assigns, or as he or they might direct or appoint then, (&c. bond to be void, &c. &c.)

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Averment, that although said Plaintiff did *afterwards, viz. 29 January, 1822*, at &c., in county aforesaid,

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aforesaid, tender the said bond with such condition as aforesaid, so duly executed as thereinbefore mentioned, to the said Defendant, and then and there requested the said Defendant to accept and take the same, and to pay him, the said Plaintiff, the said sum of 600*l.* with interest thereon as aforesaid, according to the tenor and effect, true intent and meaning of the said last mentioned agreement, and the said promise and undertaking of him, the said Defendant; yet (&c. Breach.)


Report.—[Material allegations of declaration proved, and the two agreements (a) and bond.]  
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(a) The agreements, on the language of which the judgment proceeded, were in the following terms :—

“ Articles of agreement made, concluded and agreed upon the 1st *May*, 1819, between *E. Willett*, of *Thetford*, in the county of *Norfolk*, Esq., of the one part, and *Robert Clarke*, of *Norton Hall*, in the county of *Suffolk*, Esq., of the other part. First, the said *E. Willett* doth hereby agree to sell, convey, and surrender; and the said *R. Clarke* doth hereby agree to purchase at the sum of 900*l.* all that capital dwelling-house, formerly called the *Cherry Tree*, with the brewhouse, outhouse, garden, hereditaments and premises thereto belonging, situate, lying and being in the parish of

*Stowmarket*, in the county of *Suffolk*, as the same were late in the possession of *John Kent*, a bankrupt, together with all fixtures thereto belonging, and also conformable to certain conditions of sale of the said premises at a public auction, held at the *King's Head Inn*, *Stowmarket* aforesaid, on *Tuesday*, the 27th day of *April* now last past, when the said *E. Willett* purchased the said premises to the use of him, the said *E. Willett*, his heirs and assigns: and the said *E. Willett*, in consideration of the sum of 300*l.* to him in hand well and truly paid at the execution hereof, the receipt whereof is hereby acknowledged, and also in consideration of the further sum of 600*l.* to be paid by the said *R. Clarke*,

It was shewn that Defendant took possession of the premises a few days after the 1st *May*, 1819, that

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*Clarke*, his heirs, executors, administrators or assigns, on the day or at the time or times specified in the said conditions of sale conformable thereto, together with lawful interest for the said sum of 600*l.* at and after the rate of 5*l.* per cent. per annum for the same, until the said premises with their appurtenances shall be duly surrendered or conveyed, according to the said conditions of sale, by the assignees of the estate and effects of the said *John Kent*, doth hereby agree to convey or surrender the said premises as aforesaid unto and to the use of the said *R. Clarke*, his heirs, executors, administrators or assigns, conformably to the said conditions of sale."

" Agreement made the 5th day of *June*, 1819, between *Eagle Willett*, of *Thetford*, in the county of *Norfolk*, Esq., of the one part, and *Robert Clarke*, of *Stonmarket*, in the said county, farmer, late of *Norton*, in the said county, of the other part. Whereas certain differences have arisen between the said parties respecting the meaning and execution of an agreement bearing date the 1st day of *May* last, between the said parties for the purchase of an estate at *Stonmarket*, late the property of *John Kent*, a bankrupt;

for the ending whereof it is agreed by and between the said parties hereto, as follows:— Namely, that the said *Robert Clarke* shall become the purchaser of the brewing utensils upon the said premises (except barrels and half barrels, which are to be paid for at the rates following: namely, barrels 10*s.* each, and half barrels 5*s.* each, be such casks sweet or sour, and also except all casks of a smaller size than half barrels, which smaller casks are not hereby sold, but are to remain the property of the assignees at the sum of 100*l.*, which he hereby agrees to pay to the assignees of the said *John Kent* on the 7th day of *June* instant, upon their agent being withdrawn from the possession of the premises, the above mentioned barrels and half barrels to be paid for to the said assignees upon delivery: And the said *R. Clarke*, further agrees to pay to the said *E. Willett*, the sum of 600*l.*, the residue of the purchase-money for the said estate, together with legal interest then from the date of the said recited agreement, on the 25th day of *December* next, upon the said *E. Willett* making a good title to the premises, or otherwise if such title shall not be then completed, upon the said

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that a messenger under the commission of bankruptcy against the bankrupt, whose property it had been, was at that time in possession, but quitted about the 6th *June*, delivering up possession to Defendant by order of the assignees, according to the second agreement; that the premises were principally copyhold, a very small part only being freehold; that the title deeds relating to the freehold part of the premises were in possession of an attorney, who claimed a lien on them, and that holding them adversely he had considerably delayed the Plaintiff, and had hitherto wholly prevented his completing the title, or even furnishing an abstract; that the copyhold premises were held of the Manor of *Stowmarket*, of which Messrs. *Marriott*, who were the solicitors of the Defendant, had acted for him throughout in every respect of the business of the purchase of the property, were lord and steward.

The Lord Chief Baron, who tried the cause, concluded his report by stating the objection now insisted upon as taken at the trial, and that he had overruled it then on the ground that it was matter for the consideration of a Court of Equity, but that he wished the case to be discussed upon a rule.

said *E. Willett* executing (at his own expense) a bond to complete such title, and to convey the said estate as soon as the same can be completed. And

this agreement is entered into by each party for himself, his heirs, executors and administrators. Witness the hands of the said parties."

The

The rule had been obtained by *Tindal*, upon his application, founded on the following objections.

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First, that as the Plaintiff was one of the assignees of the bankrupt, whose property the premises had been, he could not lawfully purchase the property, and, consequently, could not legally dispose of it by sale; or at least that a good title could not be made by him on that account: and

Secondly, that if he could make a title notwithstanding that objection, as he had not done so, he was not entitled to call on the Defendant for the payment of the purchase-money until a good title was made and the premises properly conveyed or assured to the Defendant.

- The objection on which the alternative of the rule for arresting the judgment was founded, was, that the performance of the act on which the right to demand the money was dependent, had not been sufficiently averred in the declaration, and that, therefore, the action could not be maintained.

*Jervis* shewed cause, insisting that the Defendant could not avail himself of the objections taken on the ground of the opinion expressed by the Lord Chief Baron. On the first objection he urged, that whatever the bankrupt or his creditors might do towards defeating the purchase on such objections, it did not lie with the Defendant to raise them; that he and his attornies were cognizant

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cognizant of them throughout, and that they were bound by notice; that the contract was beneficial to the estate, and a Court of Equity would compel its completion.

On the second objection it was contended, that under the terms of the agreement the money was to be paid at all events, whether a title could be made or not, on the execution of the bond; and a bond having been executed and tendered was sufficient to support the action.

As to the second object of the application, that the judgment be arrested, it was submitted, that the averment on which it was founded was a sufficient averment of performance of the condition precedent to raise the consideration, which entitled the Plaintiff to demand the payment of the money, and the assumpsit in respect of which the breach had been assigned; and that as no time had been limited for the execution of the bond, whilst the time for payment of the money had been made to depend on the time of the execution of the bond, that act might be performed at any time, and whenever it should be performed, the money was eo instanti demandable, and not being paid, an action immediately accrued, and might be sustained on the allegation in this declaration, putting the whole of the Plaintiff's case upon the record.

They, therefore, contended, that there was no ground for disturbing the verdict and entering a  
nonsuit,

nonsuit, or for arresting the judgment, and that the rule must be discharged.

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CLAI


*Tindal* and *Dover*, in support of the objections upon which the rule had been obtained, insisted, that neither of them had been removed or answered by the arguments urged against the application which had been made; but that the Defendant was clearly entitled to a nonsuit, as that at all events judgment must be arrested on the ground of the insufficiency of the most material averment in the Plaintiff's declaration.

They submitted that it was no answer to the first objection to say, that this Defendant had no right to raise it, and that it belonged to the bankrupt or his assignees to take it, because it was an objection founded simply on the possibility that the bankrupt or his creditors might take it, and the certainty that if taken by them it must succeed to the destruction of the Defendant's title.

In Equity (they urged) many insuperable objections to compelling a completion of purchase were founded on the mere difficulty of making title and the delay and expense.

[*Richards*, C. B. That is not an objection to title but to the conveyance, matters very frequently confounded.]

That would still be a sufficient objection to this contract. For the proposition that assignees cannot

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cannot be purchasers of the bankrupt's estate, they cited *Whichcote v. Lawrence* (c), *Campbell v. Walker* (d), and particularly *Ex parte Reynolds* (e), *Ex parte James* (f), and *Ex parte Bennett* (g), and that objection to the whole contract, which was alone in substance the only ground upon which this action for the remainder of the purchase-money could be sustained, they contended was one upon which the Defendant was fairly entitled to rest his defence, both in reason, in equity, and in law, whether it were an objection to title or to conveyance ; as to the title without assurance, or conveyance without title, would equally be an answer to the present demand.

On the same point the Court were referred to the words of Lord *Kenyon*, as singularly applicable to the facts as taken from the case of *Glazebrook v. Woodrow* (h). “ And now the Plaintiff, who is to execute the conveyance, and who is also the person to pay for it, not having made it or made a tender of it to the Defendant, nevertheless calls upon him by this action to pay the consideration money. The very statement of such a claim is enough to refute it. If these be not dependent covenants, it is difficult to conceive what covenants are so.” Lord *Kenyon* then puts the instance of a trader who had entered into such a

(c) 3 Ves. 740.

(d) 5 Ves. 678.

(e) Ibid. 707.

(f) 8 Ves. 337.

(g) 8 Term Rep. 370.

(h) 10 Ves. 381. 395.

contract



contract for the sale of an estate, becoming a bankrupt between the sale and the execution, saying “ the vendee might be in the situation of having had payment enforced from him and yet be disabled from procuring the property for which he had paid.”

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Now that they urged was precisely the predicament of the Defendant in this case.

On the point of pleading it was contended, that the declaration was not framed to sustain a judgment, because it was not sufficiently averred that enough had been done by the Plaintiff to support his action ; for that the bond had clearly not been tendered in time, or if it had, it was not a sufficient consideration ; that it was not averred that the Plaintiff had made or could make and was ready to make a good title which was required, because the bond was not to be given in lieu of title, but in furtherance of it ; whereas the only allegation is, that the Plaintiff offered a bond, and that two years after the time when it would have been consistent with the agreement.

It was therefore insisted, that whatever might be the opinion of the Court on the first branch of the motion, at all events the judgment must be arrested.

RICHARDS, *Lord Chief Baron*.—We are of opinion that this rule must be discharged, as on both the points made by the application to the Court  
on

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on the part of the Defendant, we think that there is no ground for disturbing the verdict, or arresting the judgment.

The first point that has been raised is, that the contracts which form the basis of this action having been made by a party who has purchased and sold a portion of the property of a bankrupt, being himself one of the assignees of that bankrupt's estate, under the commission of bankruptcy, were in themselves illegal, or at least such as cannot be sustained, the action must fail; as that circumstance appears by the Plaintiff's own averments in the declaration on this record.

Now notwithstanding I perfectly agree with the propositions of the counsel for the Defendant, that it is contrary to the policy of the law generally that the assignees of a bankrupt should become a purchaser of the property of the bankrupt, and that there are conclusive authorities for that, I cannot admit that they apply to this case, for that objection is wholly matter of equity, and cannot be raised by the Defendant in this proceeding at law, so as to form a ground for that part of his motion which asks for a nonsuit, on the argument that it deprives the Plaintiff of his right to sue him at law, in respect of a contract so contrary to law.

The doctrine of incapacity in an assignee to purchase the bankrupt's estate, is, even in equity, not of very remote origin. The present Lord  
Chancellor

Chancellor (*a*) is the author of that law; and though it is now established in his Court, I remember, when I first came to the bar, that it was matter at least of very considerable doubt amongst those who were at that time the most fully conversant with the principles and practice of Courts of Equity.

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Admitting the equitable objection to the title then to be now settled by the decisions which proceed on that doctrine, I do not consider that it can in any way be available in an action at law such as the present, nor in the mode in which advantage is here attempted to be taken of it. I know from experience, whatever respect I may have for the principles of equity and the rules of the Courts of Equity, that nothing can be more dangerous than mixing up matter of Equity with matter of law, and carrying maxims of Equity to Courts of Law, where questions of a very different nature are to be disposed of in a different manner and upon different principles. Courts of Law, if they would consider topics of equity, have not the machinery for sifting such questions. Courts of Equity have the means of getting at trusts and various other latent interests unknown to Courts of Law. Equitable matter must therefore be left to equitable Courts, for they would only serve to embarrass Courts of Law with the consideration of evils over which they could exercise no controul, and which they want the power and the means to remedy.

(*a*) Lord Eldon.

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Now, although in point of equity an assignee may not purchase the estate of a bankrupt, and his purchase being void or voidable he might not be able to make a good title himself, and his conveyance might be avoided, *non constat* that he cannot do so at all; for it does not follow that sufficient parties to the conveyance may not be forthcoming. There is in equity a wide difference recognized by the Courts between the considerations which belong to making title, and such as belong to making conveyance.

On that objection I am clearly of opinion that there is no ground for granting a new trial here.

On the question of the delay which has taken place, I consider that the objections to the title sufficiently account for it, and exonerate the Plaintiff from blame, or at least from such blame as should lose him his contract. His sale, perhaps, required to be confirmed by all the creditors. It is true that it is not so confirmed, still he may have expected to procure their concurrence in confirming it. At all events, the Defendant throughout knew of all the difficulties attending the completion of the title from the beginning to the end, or his attorney, who attended the preparation of the contract, did. It formed matter of discussion from the very first and at the outset, and was the cause and the basis of an agreement between the parties. They afterwards make another agreement; neither Defendant nor his attorney made any objection on the grounds now suggested,

suggested, yet they both knew that the Defendant was assignee of the bankrupt whose estate it had been, relying of course on the responsibility of the person with whom the contract was made, and having full confidence in his capacity to indemnify. The Defendant agrees to pay the money upon a good title being made, and so soon as it should be made. There was no reference to the possibility of making such a title, nor to any precise period of time within which it was to be made. Then comes the alternative contemplated and expressly stipulated for by the Defendant, of a bond to be given to him by the Plaintiff, if the title should not be completed when the remainder of the purchase-money should be paid by the Defendant. That assumes the probability that the title might not be completed; it shews the Defendant was aware of the difficulties. The title could not be completed by the time, then the bond becomes necessary according to the agreement. It is to be a bond to cause the title to be completed, and that the premises should be conveyed to the Defendant. No time is mentioned, that is left indefinite. The money, however, is to be paid *upon executing* the bond to cause the title to be completed, and that the estate should be conveyed.

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*But see Clarke  
T. 1822 3 Hare*

Under this agreement I think the Defendant has shut his own mouth, and bound himself to pay the money on the single condition of having the bond executed. He made no other stipulation in the agreement, which was advisedly entered into with all the difficulties now objected quite apparent,

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rent, and the objections now taken then existing, and known to exist. The Defendant had possession of the property, and might have had the benefit of the bond, which was all he stipulated for. He was bound then to pay the money, taking what he contracted for, the bond. Can the Court now say that he is not bound by such a contract? With its improvidence the Court have nothing to do. It was a valid contract for good consideration, freely entered into on his part. He should have taken the bond, and if the title had not been completed in due time, he might resort to his remedy on the bond. The payment of the money by him was to be immediate on the execution of the bond.

Then what was done by the parties? It is said that the bond was not executed by *Willett*, the Plaintiff, on the 25th of *December*, according to the terms of the agreement, and was not tendered till nearly two years after the time when it should have been executed. The answer to that is obvious, it is, that *Willett* was not called upon to execute it before that time. The money was not tendered, and a demand of the bond made. There is nothing in the agreement requiring the bond to be executed within any given time; on the contrary, it is an alternative depending on a very uncertain matter, the completing the title in the mean time. It is, moreover, for the accommodation and advantage of the Defendant that the execution of the bond should be postponed; it enabled him to keep his money the longer. The  
money

money was to be paid by him on the execution of the bond; the delay of executing was favourable to him. But in point of fact the Plaintiff has at length executed a bond, and he has tendered it for acceptance to the Defendant, which is tantamount to a demand of payment of the money under the agreement, and the bond so executed and tendered is conditioned properly, according to the terms stipulated by the contract between the parties. [His Lordship read the condition of the bond.]

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However much, therefore, the Court might regret the hardship of the Defendant's case, it is quite clear that, in point of law, he has no pretence, upon the objections made on this motion for a nonsuit, to set aside the verdict which has been found for the Plaintiff. It is impossible that he should succeed in such a case with a jury, and he cannot say that there is any foundation laid to induce the Court to say that it should not have gone to the jury.

On the point of pleading, on which it is sought to arrest the judgment also, I am of opinion that the averments are sufficiently positive and explicit to warrant the judgment of the Court. I am, therefore, clearly of opinion that this rule must be discharged.

GRAHAM, *Baron*.—I am certainly wholly of the same opinion. It is quite plain that the Defendant has forged chains for himself in making this agreement.

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agreement. It is equally clear that he cannot liberate himself at law, whatever other course he may possibly have of extricating himself from what is manifestly a very embarrassing difficulty.

It is certainly now clearly established in the Courts of Equity as an equitable axiom, that the assignee of a bankrupt cannot purchase any part of the bankrupt's property, or at least that such a purchase cannot stand if impugned in a Court of Equity. Had this case, therefore, rested on the first agreement between the parties, I should have considered that objection a complete answer to this action, for that the Plaintiff ought not to be permitted to recover against the Defendant the price of a title which he could not sustain in equity; and I should have thought the Defendant entitled to resist the payment of the residue of the purchase-money as now claimed by the Plaintiff, and on that ground.

Upon the second agreement, however, I think the Plaintiff has a sufficient case, and that the Defendant has shut out the plea of such an answer as would otherwise have availed him.

The first agreement was a common agreement for the sale and purchase of those premises, between the Plaintiff, one of the assignees of the bankrupt, and the Defendant.

The second agreement, which appears to have been made necessary in consequence of disputes  
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That agreements  
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to be given on the one side, and to be taken on the other. Then the bond is tendered according to the terms of the agreement. If a party chooses so to bind himself, it is his own fault, and he must submit to the consequences. This Court cannot assist him. We cannot reject on his part the alternative which he has himself assented to. He proposed and acceded to the alternative of a bond for his indemnity, and bound himself to pay the remainder of the purchase-money as soon as it should be executed; in the words of the agreement, "upon" the execution. Then the bond being so executed, the person so binding himself can give no answer to the demand of which he has made that execution of a bond the sole condition.

As to the objection that the bond tendered was not tendered conformably with the terms of the agreement, I am clearly of opinion that it is.

With respect to the time when the bond is alleged to have been tendered, I think it sufficient to observe that both parties pass it over. There is not on either side any stipulation as to the time within which it is to be executed. Upon that ground of objection, therefore, I think that nothing can be urged. The defect is not in the pleading, but in the transaction upon which it is founded. The act of executing the bond is to give the Plaintiff a right to be paid, or to sustain an action.

On

On all the points, therefore, I am of opinion that this rule must be discharged.

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WOOD, *Baron*.—I am not disposed to add any thing to what has been already so fully discussed on the question of the first objection, or the merits.

On the other point made, which raises the question of arresting the judgment, I am desirous of saying a word or two. It has been said that time is of the essence of this contract, and therefore that the averment in the declaration should have been, that the Plaintiff tendered the bond within the time in which by the agreement he was bound to do so. Undoubtedly where time is of the essence of a contract, such an averment, so stating the performance of the act necessary to be done, should be plainly and positively made; and if it had been necessary that the bond should have been tendered on the 25th of *December*, a tender should have been averred of a bond executed. If that had been necessary here, still the Plaintiff would have had the whole of the day of the 25th of *December* to have tendered the bond. Then what is the allegation here? It is, that the Plaintiff afterwards, *to wit*, on the 22d of *January*, 1822, tendered the said bond, with such condition as aforesaid so duly executed as hereinbefore mentioned, to the said Defendant, and then and there requested (&c.) Now here the substantial part of the allegation is, that the Plaintiff *afterwards* tendered the bond, &c., and that allegation would be sufficient. Then what follows the “to wit”

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wit" is immaterial, and really in pleading signifies nothing. It is a mistake to consider that the videlicet binds the pleader to a particular day, the allegation of the day preceding the words "to wit," amount to no more than afterwards, and are therefore wholly immaterial. *Non constat* that the tender may not have been made on the day following, and the party having the entire day, that would have been sufficiently in time.

In this case, however, the time is really not of the essence of the contract; it is not a contract of such a nature as to make the time essential. On these grounds I consider the word afterwards is sufficient, and that the averment is well enough.

Then it is not disputed that the condition of the bond, set out in the declaration as that of the bond in fact tendered, is not, according to the terms of the agreement, such a bond as was sufficient to satisfy the contract between the parties.

I am, therefore, also clearly of opinion that there is no ground for a nonsuit, and none for arresting the judgment in this case.

GARROW, *Baron*.—On the first point it should not be forgotten that the objection was at one time, even in equity, by no means a settled matter, but that, on the contrary, it was a point of considerable difficulty until decided by the present Lord Chancellor, who has been correctly and accurately stated to be the author of the doctrine.

I should

I should certainly myself have had very much doubt whether a Court of Equity would have relieved the parties in this case under all the circumstances, but I am quite sure that in this proceeding at law we have not the means of relieving them, even if they could shew themselves to be unquestionably entitled to relief.

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The distinction made at the bar, that the bond in this case agreed to be executed was not to be taken in lieu or instead of a title; no one suggests that it was. The object and intent of the bond are quite obvious. The fact is, that the party anxious, for the sake of pursuing the business, to have and to keep the possession, is willing to take it at all risks and hazards of title, of all of which he was well aware, agrees to take a bond to indemnify himself, the condition of which is, that the obligor will make a title. That, we know, may be done by buying in rights which may certainly, from the nature of such matters, be attended with much difficulty, expense, and delay; still it may by possibility be done, if the proper parties can be brought together, and be induced to consent. In the meanwhile, however, the purchaser is anxious for possession, and he takes it under the protection of the bond of the vendor, relying on his responsibility. The bond, therefore, was not meant to be a substitute for the title, but to be ancillary to it, and to secure it to the Defendant by the exertion of the Plaintiff.

On the other points I also concur in the opinion of the Court.

Rule discharged.

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Construction  
(of will.)

In a devise the words—"And I earnestly recommend to my said wife the care and protection of my affectionate (friend,) most heartily beseeching my said wife that she will permit and suffer the said (friend) to live and reside with her, and that she will afford to the said (friend) the same kind attention and tenderness which has been always shown her in my lifetime. And I seriously and warmly entreat my said wife at her decease to settle and assure to

two trustees such part of my real estate as she shall think proper for the special purpose of securing to the said (person) during her natural life (in case she survives my said wife, but not otherwise,) such an income as will enable the said (nominee) to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife," although sufficient, per se, to raise a trust, do not do so where they are coupled with words of confidence in the discretion of the devisee as to the exercise of a controlling power conferred upon her by the will, such as these—"And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife, (and which she must acknowledge not to be inconsiderable,) unfettered and unlimited, in full confidence, and with the firmest persuasion, that in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference." Held, that by the latter clause no trust was raised for the heirs at law of the testator's father, or any of them, the words and objects of the bequest being too vague, undefined, and uncertain. *GRAHAM, Baron, dissentiente.*

[For the other points determined in the case on the disposing effect of words in a will and the operation of trusts, &c., see the side notes.]

## HENEAGE and others v. Lord Viscount ANDOVER and others.

*JOHN WALKER HENEAGE*, by his will, dated 17th March, 1798, devised all his real estates as follows:—

"As to my worldly estate, I charge, give, devise, and dispose thereof as follows: And first, I charge and make liable all and singular my manors, messuages, lands, tenements, and real estates hereinafter mentioned, to and with the payment of all and singular the just debts which may be due and owing by me at my decease, either by mortgage, bond, or simple contract: I give and devise all and singular my manors, capital and other messuages, farms, lands, rectories, advowsons, rents, tithes, and hereditaments, situate, standing,

standing, lying, and being, and arising in the several counties of *Wilts, Berks, Somerset, and Middlesex*, my shares in the New River Water Works, and the offices of Chief Usher of his Majesty's Court of Exchequer, and Proclamator and Barrier of the Court of Common Pleas at Westminster, which I hold in fee simple, and the rights, fees, perquisites, and emoluments to the said offices belonging; and all and singular other my real estates and hereditaments whatsoever in Great Britain, with their and each and every of their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders thereof, and of every part thereof, and all and singular my estate and interest therein, unto my dear wife *Arabella Walker Heneage*, to hold the said lands, tenements and hereditaments; and all other my real estate hereinbefore particularly mentioned and set forth, unto the said *Arabella Walker Heneage*, her heirs, and assigns, for ever. I give and bequeath unto the said *Arabella Walker Heneage* all my personal estate whatsoever and wheresoever, and of what nature or kind soever, to hold the same to her the said *Arabella Walker Heneage*, her executors, administrators, and assigns for ever; and I earnestly recommend to my said wife the care and protection of my affectionate friend *Arabella Anne Caroline Jenny Pigott*, most heartily beseeching my said wife that she will permit and suffer the said *Arabella Anne Caroline Jenny Pigott* to live and reside with her, and that she will afford to the said *Arabella Anne Caroline Jenny Pigott* the same kind attention

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tion and tenderness which has been always shown her in my lifetime.

*“ And I seriously and warmly entreat my said wife at her decease to settle and assure to two trustees such part of my real estate as she shall think proper for the special purpose of securing to the said Arabella Ann Caroline Jenny Piggott during her natural life (in case she survives my said wife, but not otherwise,) such an income as will enable the said Arabella Anne Caroline Jenny Pigott to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife. And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife (and which she must acknowledge not to be inconsiderable) unfettered and unlimited, in full confidence, and with the firmest persuasion, that in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference.”*

*“ And I constitute and appoint her, my said dear wife, the said Arabella Walker Heneage, sole executrix of this my will, hereby revoking all former wills by me heretofore made, and declaring this and this only to be my last will and testament. In witness, &c.”*

The testator published a codicil dated 23d  
November,



November, 1803, giving two annuities of 100*l.* to *Arabella Calcraft*.

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He died in *February*, 1806, leaving *Arabella Walker Heneage* his widow, *Henrietta Arabella Meredith* and *John Calcraft*, his co-heirs at law, and his said co-heirs, and *Mary Dionysia*, the wife of *George Wyld*, and *Arabella B. St. Quintin*, and *Cecil M. Eliz. Calcraft*, his only next of kin, him surviving. *C. M. E. Calcraft* died leaving *John Calcraft* her sole executor.

Soon after the decease of the testator, *A. W. Heneage* proved the will and took the execution, and entered upon the real estates, and continued in possession till her death. She also possessed herself of the personal estate.

*Arabella Walker Heneage*, by her will, dated the 25th May, 1813, gave and devised all her manors, messuages, and hereditaments in *Wilts*, *Berks*, *Somerset*, *Middlesex* and *Surrey*, and all other her real estates, to the Right Honourable *Charles Meadows Pierrepont* Earl of *Manvers*, the Right Honourable *Thomas Howard* Lord Viscount *Andover* and the Right Honourable *Charles Pierrepont*, then Lord Viscount *Newark*, and their heirs, to the use of *Robert Nicholas* and *George Wyld*, their executors, administrators and assigns, for five hundred years, to commence from the time of the said testatrix's decease, without impeachment of waste, but upon the trusts nevertheless thereafter declared; and from the end, or other  
sooner

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sooner determination of the said term of five hundred years and in the meantime subject thereto, and to the trusts thereof, to the use of the Plaintiff, *George Heneage Walker Heneage* and his assigns for his life, with remainder to the said Earl of *Manvers*, Viscount *Andover*, and Viscount *Newark*, and their heirs, during the life of the said *George Heneage Walker Heneage*, in trust to preserve contingent remainders; and after the decease of the said *George Heneage Walker Heneage*, to the use of the first, second, and every other the son and sons of the body of the said *George Heneage Walker Heneage*, lawfully to be begotten in tail male; with remainder to the Plaintiff, *Thomas John Wyld*, for his life; with remainder to his first and other sons in tail male; with remainder to *James William Wyld*, since deceased, for life; with remainder to his first and other sons in tail male; with remainder to the fifth and sixth and every other son of *George Wyld*, by *Mary Dionysia* his wife in tail male; with remainder to the use of the first and every other son of the Plaintiff, *George Heneage Walker Heneage*, in tail male; with like remainder to the sons of his brothers; with remainder to the daughters of the said *George Heneage Walker Heneage*, severally and successively in tail general, and for default of such issue, to the use of the daughters of his said brothers in tail general: with the ultimate remainder to the Plaintiff, *Francis John St. Quintin*, his heirs and assigns, for ever.

The term of five hundred years was declared to be

be limited in use to the said *Robert Nicholas* and *George Wyld*, their executors, administrators, and assigns as aforesaid, upon trust that they should, out of the rents and profits of the hereditaments and premises comprised in the said term, pay to Defendant, *Arabella Anne Caroline Jenny Pigott*, the clear net sum of 500*l.* free from the legacy duty and all deductions, to be paid her as soon as conveniently might be after the said testatrix's decease, and should also pay the sum of 700*l.* (the like sums having been expended by the testatrix in renewing a copyhold estate in *Cherhill*, in the said county of *Wilts*, held under *Mr. Grub*,) unto her executors thereafter named, to be applied by them upon the trusts thereafter declared concerning residuary personal estate; and upon further trust during the life of the said *Arabella Anne Caroline Jenny Pigott*, in case she should continue unmarried, by and out of the rents, issues, and profits of the several manors and other hereditaments and premises comprised in the said term of five hundred years, or any of them, to levy and raise the clear yearly sum of 1,000*l.* of lawful money, free from legacy duty, land tax, and all other taxes and deductions; and should pay, apply, and dispose of such yearly sum of 1,000*l.* by equal half-yearly payments into her proper hands, in manner therein mentioned, and in like manner to levy and raise the several other annuities therein mentioned, and subject to the several trusts and directions therein declared and hereinbefore mentioned of the said term of five hundred years upon further trust; and the


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testatrix directed that the said trustees should, out of the residue of the rents, issues, and profits of the hereditaments and premises comprised in the said term of five hundred years, levy and raise all such sum and sums of money, not exceeding in the whole the sum of 8,000*l.*, as shall be necessary to satisfy, pay, and discharge all such debts and principal sums of money and interest due thereon, as might be justly due and owing by the said testatrix's late husband, *John Walker Heneage*, in his lifetime or by herself, either by mortgage, bond, simple contract, or otherwise; all which she directed the said *Robert Nicholas* and *George Wyld*, and the survivor of them, or the executors and administrators of such survivor, to pay, satisfy, and discharge out of the said rents and profits, not exceeding the said sum of 8,000*l.*, in such manner, proportions, and form as they should think fit, and as soon as conveniently might be after her decease, and subject, and without prejudice, to the several trusts and directions thereinbefore declared and mentioned of and concerning the said term of five hundred years upon trust; and she directed that the said trustees should pay and apply the residue and overplus of the net rents, issues, and profits of the premises comprised in the said term of five hundred years unto, or permit and suffer the same to be received and taken by or for the benefit of the person or persons respectively who, for the time being, should be next entitled to the reversion or remainder of the said premises expectant on the said term of five hundred years, under or by virtue of the limitations

tions before contained. And the said testatrix thereby directed, that when all and every the trusts and purposes thereby declared and directed of the said term of five hundred years should in all things be fully performed and satisfied, or should be discharged, either by becoming unnecessary, or by being incapable of being performed, or by any other means; and when the said *Robert Nicholas* and *George Wyld*, and each of them, their, and each of their executors and administrators, should be reimbursed and satisfied all charges and expenses occasioned by or relating to the trusts thereby in them reposed, then the same term of five hundred years should cease and determine and be utterly void. And the said testatrix declared her will and mind to be that after satisfaction of the trusts therein and hereinbefore mentioned of the said term, so far as related to the payment of debts, if the person or persons for the time being entitled to an estate for life in the hereditaments hereinbefore devised in settlement by the said will should be under the age of twenty-one years, then, during his or their minority, the said Earl of *Manvers*, Viscount *Andover*, and Viscount *Newark* should enter into and hold possession of the said manors and other hereditaments, and receive and take the rents, issues, and annual proceeds and profits, and out of the same apply any annual sum or sums of money according to the age or respective ages of such minor or minors respectively, but not at any one period exceeding the yearly sum of 800*l.*, for or towards the maintenance or education of

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such minor or minors respectively, and subject thereto lay out and invest the said yearly rents, issues and profits, or the surplus thereof, in manner therein mentioned. And the testatrix declared her will and mind to be, that they, the said trustees, should be possessed of and interested in the said stocks, funds and securities, interests, dividends and annual produce, and the accumulations respectively upon trust, at the end of such minority, or sooner if they should think proper, to call in or dispose of the same and convert them into money, and lay out and invest the money, to arise and be produced as last mentioned, in the purchase of freehold estates of inheritance, to be situate in the county of Wilts, and should settle and assure the same to the uses to which the manors and other hereditaments, from the rents and profits of which the accumulations should have been respectively produced, should, by virtue of the said will, then stand limited and settled. And the said testatrix, after making certain specific bequests and legacies, gave and bequeathed to the said trustees the sum of 2,415*l.* 14*s.* Three per Cent. Bank Annuities, then standing in the name of the Accountant General of the Court of Chancery, in trust, to permit the dividends for ever to be received by or for the benefit of the person or persons respectively who, for the time being, should be in possession of her said estate and premises, by virtue of the limitations thereinbefore contained. And the said testatrix gave and bequeathed the residue of her money, stocks, funds, and all other  
her

her personal estate to the said Viscount *Andover*, *Robert Nicholas*, and *George Wyld*, upon trust, for the person therein mentioned. And the said testatrix appointed the said Lord Viscount *Andover*, *Robert Nicholas*, and *George Wyld*, executors of her said will.


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By a codicil dated the 9th of *April*, 1815, after reciting that since the making her will she had purchased from *Robert Maundrell*, Esq. a freehold estate in *Compton Bassett*, then in the occupation of *Clare Flower*, for 2,555*l.*, she thereby gave and devised the same unto and to the use of Sir *Jonathan Cope*, Bart. and *Edward Goddard*, Clerk, their heirs and assigns, for ever, upon trust nevertheless, immediately after her decease, to offer the same, together with the timber thereon growing, unto the Earl of *Manvers*, Viscount *Andover*, and *Robert Nicholas*, to be by them purchased for the sum of 2,627*l.*; and her will was, that in case the said Earl, Viscount, and *Robert Nicholas*, should be desirous of purchasing the hereditaments and premises at the said sum of 2,627*l.*, that the said Sir *Jonathan Cope* and *Edward Goddard* should convey and assure the said hereditaments unto and to the use of the said Earl, Viscount, and *Robert Nicholas*, for ever, upon the trusts, nevertheless, and subject to the like restrictions as were declared and directed in her said will concerning her manors, capital and other messuages, lands and hereditaments, in her said will devised unto the said Earl, Viscount, and *Robert Nicholas*, and their heirs, upon trust, for the immediate benefit of

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of the Plaintiff and his issue in tail male, and the several other persons in the limitations of her said will mentioned. And the said testatrix thereby authorized and empowered the said Earl, Viscount, and *Robert Nicholas*, from and out of the rents, issues, and profits of all and singular her real estates, to raise and advance the said sum of 2,627*l.* for the purchase of the said hereditaments and premises to be settled and conveyed to them in manner aforesaid.

By another codicil dated the 27th of *April*, 1816, the testatrix revoked the appointment of *George Wyld* as a trustee and executor, and in his stead appointed the defendant *Edward Goddard*; and she also appointed the said *Edward Goddard* a joint executor of her will (instead of the said *George Wyld*), together with the said Lord Viscount *Andover* and *Robert Nicholas*.

The testatrix *Arabella Walker Heneage* died the 26th of *June*, 1818, without having revoked or altered her said will and codicils, or either of them, save as revoked or altered by the codicils, save as the former of such codicils were or was revoked or altered by the latter thereof respectively; and she left *Arabella Diana* Duchess of *Dorset*, the wife of *Charles* Earl of *Whitworth*, and *Catherine* Countess of *Aboyne*, the wife of *George Gordon* Earl of *Aboyne*, her coheirs at law.

*George Heneage Walker Heneage, Thomas John  
 Wyld, William Thomas Wyld, John Wyld, Mary  
 Cecil*



*Cecil Wyld, Arabella Elizabeth Wyld, Caroline Patience Wyld, Cecil Catherine Wyld, and Elizabeth Milward Wyld, with the said James William Wyld,* were the only children of *George Wyld* by the said *Mary Dionysia* his wife, all of whom, except the said *James William Wyld*, who died in the lifetime of the testatrix, were living at the time of her death.

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and others.

The Earl of *Manvers* died in the life-time of *Arabella Walker Heneage*; and Viscount *Newark* having renounced, the respondents the Earl of *Suffolk*, *Robert Nicholas*, and *Edward Goddard*, proved the will and codicils.

*James William Wyld* died an infant.

*George Heneage Walker Heneage* took the name of *Walker Heneage*, and the arms of the testatrix.

*George Heneage Walker Heneage, Thomas John Wyld, William Thomas Wyld, John Wyld, Mary Cecil Wyld, Arabella Elizabeth Wyld, Caroline Patience Wyld, Cecil Catherine Wyld, and Elizabeth Milward Wyld*, all then infants, by *George Wyld*, their father and next friend, and the said *Francis John St. Quintin*, then an infant, by the said *George Wyld* his next friend, in Michaelmas term, 59th *George 3*, exhibited their bill in the Ex-  
chequer against Lord Viscount *Andover*, *Robert Nicholas*, and *Edward Goddard*, stating the matters aforesaid; and further that *George Heneage Walker Heneage* was the first tenant for life in possession of the said devised estates, sub-  
ject

BILL.

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ject to the prior trusts of the said term of 500 years; and that *John Wyld*, who was the fifth son of *George Wyld* and *Mary Dionysia* his wife, was entitled to the first estate of inheritance, and *Francis John St. Quintin* was entitled to the ultimate remainder in fee of the said devised estates, and that the other Plaintiffs were respectively and successively entitled for life in remainder, with remainder to their issue in tail, and that the Plaintiffs were entitled in remainder successively to estates tail in the said devised estates; and stating and charging, in particular, that under and by virtue of the said will of the said testator, the said testatrix took an estate in fee simple in the estates devised by his will, and that she had good power to will and devise the same, as she had done by her said will. And further stating and charging as therein is stated and charged: prayed that the said Defendants might answer the premises, and that the said will of the said testatrix might be established, and that the trusts of the will might be performed and carried into execution by and under the direction and decree of the Court, and that the rights and interests of all parties under the said respective wills might be ascertained and declared, and that an account might be taken of the debts of the said testatrix, as well such as were a charge on or affected the said devised estates as otherwise, and that all such debts and charges might be directed to be paid by the said Lord Viscount *Andover*, *Robert Nicholas*, and *Edward Goddard*, as the executors of the said testatrix, out of her personal estate, and, unless they should

Charges.

Prayer.

should admit assets for that purpose, then that an account might be taken of the personal estates and effects of the said testatrix, and that an account might be taken of the several articles of furniture, jewels, and effects specifically bequeathed by the said testatrix as heir-looms, and that an inventory thereof might be made, and that proper directions might be given for preserving and taking care of the same, for the benefit of the said *George Heneage Walker Heneage*, and the other persons who were or might become entitled to the same under and by virtue of the said testatrix's will; and that an account might be taken of the rents and profits of the said devised estates which had been received by the said Lord Viscount *Andover*, *Robert Nicholas*, and *Edward Goddard* respectively, or by their order, or for their use, and that a proper sum might be paid out of such rents and profits, and out of the future rents and profits of the said estates, for the maintenance and education of the said *George Heneage Walker Heneage* during his minority, and that the surplus rents might be invested and secured according to the directions of the said testatrix's will, and that some proper person might be appointed by that Court to receive the rents of the said devised estates, with the usual directions; and for further relief.

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Prayer of bill.

The Defendant *Henrietta Arabella Meredith*, in her answer, stated, amongst other things, that she and *John Calcraft* were the coheirs at law of the testator *John Walker Heneage*, and also the coheirs at law of the said *John Walker* the father

 Answer of *Hen-*  
*rietta Arabella*  
*Meredith.*

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 Answer of H.  
A. Meredith.

father of the said testator, and that, for the reasons therein and hereinafter mentioned, they questioned or disputed the validity of the said will of the said testatrix, for she said she was advised and believed that, under or by virtue of the said will of the said testator *John Walker Heneage*, the said testatrix *Arabella Walker Heneage* took a beneficial interest for her life only in the said estates devised by the said will, and in the surplus or residue of the said testator's personal estate and effects, with a trust or power only to devise and bequeath the same at her death, together and entire, to such of the heirs of the said *John Walker*, the father of the said testator, as she thought best; and that the said testatrix *Arabella Walker Heneage* ought to have exercised such trust or power in favour either of *Henrietta Arabella Meredith* or of *John Calcraft*; and the said testatrix not having done so, her said will and the codicils thereto, so far as regarded the beneficial interest in the said real estates of the testator *John Walker Heneage*, and the said surplus or residue of his personal estate and effects, were void, except so far as concerned the devises and bequests therein contained in favour of *Arabella Anne Caroline Jenny Pigott*; and that either she the said appellant *Henrietta Arabella Meredith*, and the said other appellant *John Calcraft*, as co-heirs of the said *John Walker*, the father of the said testator *John Walker Heneage*, were absolutely entitled to the beneficial interest in the said real estates of the said testator *John Walker Heneage*, and to the said sum of 2,415*l.* 4*s.* 3 per cent.

Consolidated

Consolidated Bank Annuities, and to the surplus or residue of the personal estate and effects of the said testator, or else that she the said *Henrietta Arabella Meredith* and the said *John Calcraft*, as coheirs of the said testator *John Walker Heneage*, were absolutely entitled to the beneficial interest in the said real estates, and to the said sum of 2,415*l.* 4*s.* 3 per cent. Consolidated Bank Annuities; and that they the said *Arabella Bridget St. Quintin* and *Mary Dionysia Wyld*, as the sole next of kin of the said testator *John Walker Heneage*, and the said Viscount *Andover, Robert Nicholas*, and *Edward Goddard*, as executors of the said testatrix *Arabella Walker Heneage*, the widow of the said testator *John Walker Heneage*, were entitled to their respective distributive shares of the surplus or residue of the personal estate and effects of the said testator, subject to the devises and bequests in the said will of the said testatrix *Arabella Walker Heneage*, and the codicils thereto contained in favour of the said Defendant *Arabella Anne Caroline Jenny Pigott*; and the said Defendant and appellant *Henrietta Arabella Meredith* insisted accordingly upon her right and title to one moiety or half part of the said real estates of the said testator *John Walker Heneage*, and of the said sum of 2,415*l.* 4*s.* 3 per cent. Consolidated Bank Annuities, and either to one moiety or else one eighth part of the said surplus or residue of his personal estate and effects, subject as aforesaid.

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The Defendant, *John Calcraft*, in his answer stated, amongst other things, that he submitted  
 to

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*Calcrafft.*

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Answer of John  
Calcraft.

to the Court, that by the will of the said testator, *John Walker Heneage*, a trust was imposed on the said *Arabella Walker Heneage*, his wife, as to the real and personal estates given to her by his said will, to leave the whole of such estates to one of the heirs of the late father of the said *John Walker Heneage*. And he submitted, that the said testatrix had not duly exercised her power over the said estates in the devise thereof which she had made by her said will, inasmuch as she had not selected one of the heirs of the late father of the said *John Walker Heneage* as the object of the devise of such estates. And he stated, that as one of the heirs of the said *John Walker Heneage*, and of his late father, he claimed the benefit which, under the will of the said testator, *John Walker Heneage*, he submitted, had been raised for the heirs of the said late father of the said *John Walker Heneage*, by his said will, in the event of the power of selection thereby given to the said *Arabella Walker Heneage* not being duly executed.

And he stated, that the said *John Calcraft*, and the said other appellant *Henrietta Arabella Meredith*, questioned and disputed the validity of the said will of the said testatrix, on the ground that by the said will of the said testator *John Walker Heneage*, a trust was created for the heirs at law of the said *John Walker*, the father of the said testator *John Walker Heneage*, which was not executed by the will of the said testatrix according to the manifest and express intention of the said testator ;

testator; but that, on the contrary, the said testatrix, by her said will, had wholly departed from the clear and express directions of the said testator, as he, the said appellant, humbly submitted and insisted would appear upon reference to the said wills of the said testator and testatrix. And he stated, that he was advised, and he humbly insisted, that the said testatrix did not take an absolute beneficial estate in fee simple in the said devised estates under or by virtue of the said will of the said testator; and he submitted and insisted that she could not have any power or authority to devise the said estates in the manner which she had affected to do by her said will.

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The Defendants, the Earl of *Whitworth* and the Duchess of *Dorset*, and the Earl and Countess of *Aboyne*, admitted the wills and codicils of the said testator and testatrix, and their deaths.

The Defendant *Arabella Anne Caroline Jenny Pigott*, by her answer, also admitted such wills; and she claimed to be entitled to the legacy of 500*l.* and the annuity of 1000*l.* given to her by the said will of the said testatrix out of the rents and profits of the devised estates; and she insisted that 700*l.* ought to be raised out of the rents and profits of the devised estates, and added to the residuary personal estate, according to the directions contained in the will of the testatrix, for the benefit of all other persons entitled to the same; and also that the funeral and testamentary expenses of the said testatrix ought to be raised out of

Answer of *Arabella A. C. J. Pigott*.

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of the said rents and profits; and she insisted, that in case it should be the opinion of the Court that the disposition and limitations of the said devised estates contained in the said will were invalid, and ought not to be carried into execution, that the household goods and furniture, implements, plate, diamonds, and other effects directed by the said will to go along, and ever be held, used, and enjoyed with the said devised messuage or mansion-house and premises, by the person or persons respectively who, for the time being, should, under or by virtue of the limitations or directions in the said will mentioned, be in the possession of the said messuage, mansion-house, and premises, ought to sink and become part of the residuary personal interest of the said testator.

*Jenny Pigott*, by her answer, admitted that the personal estate of the testatrix was more than sufficient for the payment of all her debts, and the debts which were due from her late husband; but she stated, that the said debts were charged by the testatrix upon the devised real estates, to the amount of 8,000*l.*; and she submitted, that a sufficient sum, not exceeding 8,000*l.*, to be levied and raised out of the rents and profits of the said real estates devised by the said testatrix's will, and applied to the payment of the said debts in exoneration of the residuary personal estate of the said testatrix; and she claimed to be entitled to a contingent reversionary annuity of 200*l.*; and submitted the same point to the Court with respect



respect to the 700*l.* and the heir-looms, as the said *Arabella Anne Caroline Jenny Pigott* did.

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The Defendant *Edward Warren Caulfield*, by his answer, claimed to be entitled under the will of the said testatrix to the presentation to one of the rectories devised by the said will, when he should be in holy orders qualified to take the same.


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The other Defendants, by their answers, submitted their interests to the Court.

The answers having been replied to, and witnesses examined, the cause came on to be heard on the 12th day of *June*, 1820, when the Court declared that the said will and codicil of the said *John Walker Heneage*, the testator, and the said will and codicils of the said *Arabella Walker Heneage*, the testatrix in the pleadings named, were well proved; and it was amongst other things ordered, that it should be referred to the Deputy Remembrancer to inquire and state to the Court who was or were the heir or heirs at law, and next of kin of the said *John Walker*, the father of the said testator *John Walker Heneage*, at the date of the said testator's will, and also at the date of the will and codicils, and at the time of the said testator's death; and also at the date of the will and codicils, and at the time of the death of the said *Arabella Walker Heneage*, and who would have been the heir at law and next of kin of the said *John Walker*, at the date of the said

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said testator's will, and at the date of his codicil, in case the said testator had been then dead without issue; and who was or were the heir or heirs at law and next of kin of the said testator at the time of his death, and at the time of the death of his said widow, and whether such heir or heirs at law and next of kin of the said *John Walker*, and of the said testator, respectively, or any of them, were then dead: and if the Deputy Remembrancer should find that such heir or heirs at law and next of kin of the said *John Walker*, and of the said testator, respectively, or any of them, were then dead; then that he should inquire and report to the Court who was or were then the heir or heirs at law or devisees of such deceased heir or heirs at law of the said *John Walker*, and of the said testator, respectively, and who was or were then the personal representatives of such deceased next of kin of the said *John Walker*, and of the said testator, respectively; and to inquire and report to the Court to whom the real and personal estate of the said testator *John Walker Heneage* was given by the said will of the said *Arabella Walker Heneage*, and whether the persons to whom the said estates were so given were related to the said *John Walker*, in any and what degree; and if any special matter should arise in making the said inquiries, the said Deputy Remembrancer was to be at liberty to state the same to the Court, and any of the parties were to be at liberty in the mean time to apply to the Court as there should be occasion.

In

In pursuance of the said decree, and of a general order of transfer, 3d *November*, 1820, Master *Spranger*, to whom the said cause was thereby transferred, made his report, dated the 25th of *May*, 1821, and thereby certified that he found that the said testator's will was dated the 17th day of *March*, 1798, and that the codicil to the said will was dated the 23d day of *November*, 1803, and he found that the said testator died on the 26th day of *February*, 1806, and he found that at the time of the date of the said will, and also of the said codicil to the said will, the testator was the eldest or only surviving son and heir at law of his father, *John Walker*, and that at the date of his will, the said testator, and his two sisters, *Dionysia*, the widow of *Theophilus Meredith*, and *Cecil Anne*, the wife of *Thomas Calcraft*, were the next of kin of the said *John Walker*.

And he found, that the said *Cecil Anne Calcraft* died in the month of *October*, 1799, leaving the Defendants *John Calcraft*, *Arabella Bridget Calcraft*, now *Arabella Bridget St. Quintin*, *Mary Dionysia Calcraft*, now *Mary Dionysia Wyld*, and *Cecil Mary Elizabeth Calcraft*, since deceased, her only children her surviving: that the said *Dionysia Meredith* died in the month of *May*, 1801, leaving the Defendant, *Henrietta Arabella Meredith*, her only child; that at the date of the said testator's codicil, the next of kin of the said *John Walker* were the said testator and his the said testator's nephew and nieces, *Henrietta Arabella Meredith* and *John Calcraft*, and *Arabella Bridget St. Quintin*,

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"That at the death of testator, *H. A. Meredith* and *John Calcraft* were the heirs at law of *John Walker*, that they and others of the Defendants were his next of kin, and also at the death of the testatrix.

*St. Quintin*, and *Mary Dionysia Wyld*, and the said *Cecil Mary Elizabeth Calcraft*: that at the decease of the said testator, the heirs at law of the said *John Walker* were the said *Henrietta Arabella Meredith* and *John Calcraft*, and that the next of kin of the said *John Walker* were the said *Henrietta Arabella Meredith* and *John Calcraft*, and the said *Arabella Bridget St. Quintin*, *Mary Dionysia Wyld*, and *Cecil Mary Elizabeth Calcraft*: that the said *Arabella Walker Heneage*, the widow of the said testator, made her will, dated 25th *May*, 1813, and that she made four codicils: that the said testator's said widow died on the 25th *June*, 1818, and that at the several times of making her said will and four codicils, and of her decease, the said *Henrietta Arabella Meredith* and *John Calcraft* were the heirs at law of the said *John Walker*, and the said *Henrietta Arabella Meredith* and *John Calcraft*, and the said *Arabella Bridget St. Quintin* and *Mary Dionysia Wyld*, were the next of kin of the said *John Walker*: and he found that in case the said testator had been dead, without issue, at the time of the date of his said will, the said *Dionysia Meredith* and *Cecil Anne Calcraft*, the said testator's two sisters, would have been the co-heiresses at law of the said *John Walker*, and also his next of kin: and that in case the said testator had been dead without issue, at the time of the date of his said codicil, the said *Henrietta Arabella Meredith* and *John Calcraft* would have been the heirs at law of the said *John Walker*, and the said *Henrietta Arabella Meredith* and *John Calcraft*, and the said *Arabella Bridget*

*Bridget St. Quintin, Mary Dionysia Wyld, and Cecil Mary Elizabeth Calcraft*, would have been the next of kin: and he found that the said *Henrietta Arabella Meredith* and *John Calcraft* were the heirs at law of the said testator at the time of his decease, and also at the time of the death of his said widow, and that the next of kin of the said testator, at the time of his decease, were the said *Henrietta Arabella Meredith* and *John Calcraft*, and the said *Arabella Bridget St. Quintin, Mary Dionysia Wyld, and Cecil Mary Elizabeth Calcraft*.

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That the same  
persons were  
also heirs at law  
and next of kin  
of the testator,  
*John Walker*  
*Heneage*.

And he found that the said *Cecil Mary Elizabeth Calcraft* died in the month of *November*, 1808, unmarried, and that the next of kin of the said testator, at the death of his said widow, were the said *Henrietta Arabella Meredith* and *John Calcraft*, and the said *Arabella Bridget St. Quintin* and *Mary Dionysia Wyld*: that the said *Cecil Anne Calcraft* and *Dionysia Meredith*, the two sisters of the said testator, departed this life at the several times hereinbefore mentioned, and that the said *Cecil Anne Calcraft* left the said *John Calcraft* her heir at law, and by her will, bearing date the 28th day of *April*, 1799, appointed her eldest daughter, the said *Cecil Mary Elizabeth Calcraft*, sole executrix, and who duly proved the same on the 19th day of *October*, 1799, and who was since dead, having made her will, bearing date the 22d day of *April*, 1805, and thereby appointed the said *John Calcraft* her sole executor, who proved the said will in the Prero-

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cils, &c. &c.

gative Court of *Canterbury* on the 22d day of *November*, 1808, and thereby became and was the personal representative both of the said *Cecil Anne Calcraft* and *Cecil Mary Elizabeth Calcraft*: that the said *Dionysia Meredith* left the Defendant *Henrietta Arabella Meredith* her sole heiress at law, and made her will, dated 5th *January*, 1796, and that probate thereof had been granted to the said *Henrietta Arabella Meredith* by the Prerogative Court of *Canterbury*, whereby she became and was the personal representative of the said *Dionysia Meredith*: that the said testator made his will and codicil as aforesaid, and thereof appointed his widow sole executrix, who, after his death, proved the said will, and that she by her said will and codicils appointed the Earl of *Suffolk* (then Lord *Andover*), *Robert Nicholas*, and *Edward Goddard*, her executors, who after her death proved her said will and codicils, and thereby became as well the personal representatives of the said testator's widow as of the said testator.

And after setting forth the said will of the said testator, and the will and four several codicils of the said testatrix in his said report, the Master certified, that it did not appear to him that any part of the *personal* estate or effects of the said testator was given by the will of the said *Arabella Walker Heneage* to any person or persons, save and except such part of the household furniture and other effects in the mansion-house at *Compton Bassett* as had been the property of the said testator, and remained unsold at her death;  
and

and also except the several articles which in her said will and codicils were respectively mentioned and bequeathed to the persons in the manner in the said will and codicils and hereinbefore-mentioned.

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And the Master found, from the evidence laid before him in that behalf, that the personal estate of which the said testator died possessed, including the said furniture and other articles so bequeathed by the said *Arabella Walker Heneage*, was of the value of 10,059*l.* 15*s.* 3*d.* and no more; and that the said *Arabella Walker Heneage* paid, in discharge of the said testator's debts and funeral and testamentary expenses, various sums of money, amounting to 11,846*l.* 10*s.* 7*d.*; and that there still remained various sums of money due from the said testator, to the amount of 6,900*l.*

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amount of the  
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sonal estate.

And he further certified, that the real estates of the said testator were, by the said will of the said *Arabella Walker Heneage*, given and devised, subject to the hereinbefore-mentioned term of five hundred years, vested in the said *Robert Nicholas* and *Edward Goddard*, to or in favour of the said *George Heneage Walker Heneage*, *Thomas John Wyld*, *William Thomas Wyld*, the said *James William Wyld* (since deceased), and the said *John Wyld*, *Mary Cecil Wyld*, *Arabella Elizabeth Wyld*, *Caroline Patience Wyld*, *Cecil Catherine Wyld*, and *Elizabeth Milward Wyld*, the sons and daughters of the said *George Wyld* and *Mary Dionysia* his wife, and all and every other the sons and daughters

The several de-  
vizes and limita-  
tions of the testa-  
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ters of the said *George Wyld* and *Mary Dionysia* his wife, with such limitations for life and in tail, with such remainders over, as were contained in the said will of the said *Arabella Walker Heneage*, and as are also hereinbefore mentioned, with such ultimate remainder to the said *Francis John St. Quintin* in fee, as in the said will and also hereinbefore-mentioned.


State of the  
family at the  
time of the  
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And he found that the said *James William Wyld*, son of the said *George Wyld* and *Mary Dionysia* his wife, was since dead, an infant, and that the only children of the said *George Wyld* and *Mary Dionysia* his wife, who were then living, were, the said *George Heneage Walker Heneage*, *Thomas John Wyld*, *William Thomas Wyld*, *John Wyld*, *Mary Cecil Wyld*, *Arabella Elizabeth Wyld*, *Caroline Patience Wyld*, *Cecil Catherine Wyld*, and *Elizabeth Milward Wyld*. And he further certified, that the said *Mary Dionysia Wyld* and *Arabella Bridget St. Quintin* were two of the daughters of *Thomas Calcraft* and *Cecil* his wife, which said *Cecil Calcraft* was one of the daughters of *John Walker*, the father of the said testator *John Walker Heneage*, and the said *George Heneage Walker Heneage*, *Thomas John Wyld*, *William Thomas Wyld*, *John Wyld*, *Mary Cecil Wyld*, *Arabella Elizabeth Wyld*, *Caroline Patience Wyld*, *Cecil Catherine Wyld*, *Elizabeth Milward Wyld*, and *Francis John St. Quintin*, (to or in favor of whom the real estate of the said testator *John Walker Heneage* was given by the will of the said *Arabella Walker Heneage* as aforesaid) were related to and

were



were great-grand-children of the said *John Walker*. And he further certified, that the said *Mary Dionysia Wyld*, who is named in the will of the said testatrix, was related to and was granddaughter of the said *John Walker*. And he further certified, that it did not appear to him that the said *Arabella Anne Caroline Jenny Pigott*, *William Chivers*, *William Hill* and *Henrietta Maria* his wife, *John Savage*, Sir *Jonathan Cope*, Baronet, the Reverend *Jonathan Cope*, Clerk, *Edward Warren Caulfield*, *Anne Bolleville*, *Toby Wade Caulfield*, and *Arabella Calcraft*, who are respectively named in the will and codicils of the said testatrix, or any of them, were related to the said *John Walker* in any degree. All which he submitted to the Court:

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On the hearing of the cause it was contended in argument on the part of the Plaintiffs, by

*Wetherell*, *Roupell*, *Preston*, and *Skirrow*, that the main questions for the Court would be, first, whether any trust had been created by the will of *John Walker Heneage*, so as to make his widow, the testatrix, merely a trustee, or whether she did not take an absolute fee discharged of any trust: secondly, whether she had a disposing power in favour of heirs as a class of persons: and lastly, whether she had not properly exercised such a power, if she had it, by the bequests in her own will.

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They submitted that those questions depended on the construction to be put on the first will, as  
 far

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far as the intention of the testator was to be collected from the language of it being so read as to give effect to every part of it.

On the first point, that no trust was created by this will under the words of recommendation, but what the civilians term an imperfect obligation, they urged, that to raise a trust the objects must be certain and the subject must be certain; whereas here both were uncertain, depending wholly on the will of the testatrix, both as to whom she should give the property, and as to how much she should give; that the word “heirs” did not mean the legal heir of the testator, in strict technical sense, but must in this case be taken as in common acceptation to mean descendants; and being so taken, they insisted that the testatrix, having power to do so even if she were (notwithstanding the words of the devise to her, that it was to be unfettered and limited,) fettered, contrary to such express words, with the burthen of a trust, had satisfied it by her disposition of the property over.

On the first point they cited amongst very many others the following principal cases to shew that, by the construction of such words of recommendation and confidence, accompanying devises as here, no trust was considered to be raised in equity; *Bland v. Bland* (a), *Pushman v. Filliter* (b); and on the point of her taking an absolute fee, *Loveacres ex dem. Mudge v. Blight* (c).

(a) Prec. in Chan. 200.

(b) 3 Ves. 7.

(c) Cowp. 352.

On the second point, that (assuming a trust in the devisee and testatrix, the widow of the testator,) she had a power under the will to dispose of the property in execution of such trust, by selecting such of the descendants of the testator as his heirs, using that word as descriptive of a class of persons contemplated by the testator, not being, strictly or legally speaking, his heirs, they cited a series of cases, established upon a distinction between a trust coupled with a power, and a power independent of a trust, that the donee of the power, in such a case as this, has a right to select from amongst a class of persons so designated, such as he may think proper to nominate; *Harding v. Glynn* (a), *Brown v. Higgs* (b), *Thomas v. Hole* (c), *Atkyns v. Wright* (d), and the fact of the estate given by the present wills being of a mixed nature, including both real and personal, was much relied on as assisting the argument, that the word "heirs" was used to describe a class of persons, and not to be taken technically; citing *Pyot v. Pyot* (e).

To shew that the word "heirs" might be used in a much larger and more comprehensive sense than its ordinary legal meaning, and so as to designate different persons, they cited the following passages from Bracton, "*De Legibus (&c.)*" fol. 64, b. 2.

"Est autem hæres remotus, ut si quis haberet

(a) 1 Atk. 468.

(c) Forester (Ca. temp. Talbot) 251.

(b) 4 Ves. 708, 5 Ves. 495, (d) Coop. 111. S.C. 17 Ves. 255.

8 Ves. 574.

(e) 1 Vez. sen. 335.

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plures filios, et unicam filiam, masculi erunt hæredes propinqui, et filia hæres remota. Si autem plures filios et nullam filiam, sed nepotes ex filiis. filii erunt hæredes propinqui, et nepotes hæredes remoti.—Si autem filii & filia et nepotes defecerint, tunc erit hæres propinquus, frater et soror ei qui fuerit in seisinâ hæreditatis. Si autem filios habuerit, deficiente filia et nepotibus, erit avunculus vel amita in linea transversali, hæres remotus, et omnes ex illa provenientes in eadem linea transversali erunt hæredes remotiores.

“Item sunt propinqui et propinquiores, propinquior autem dici poterit ille ad quem jus proprietatis immediate post mortem antecessoris descendit, vel propter ætatem. Ut si quis plures haberet filios jus proprietatis semper descendit ad primogenitum eò quòd ipse inventus est, primò in rerum natura, et alii remanebunt ei propinqui vel propinquiores, secundum quod liberos habuerit vel non habuerit. Si autem in vitâ patris, antenatus decesserit sine hærede de se, frater postnatus locum suum obtinebit, et incipiet esse patri communi hæres propinquior et alii post nati propinqui, et sic fiet de aliis in infinitum.”

So, in Co. Litt. fol. 9. “Sub quibus vocabulis (hæredibus suis) omnes hæredes propinqui comprehenduntur et remoti nati et nascituri, and hæredum appellatione veniunt hæredes hæredum in infinitum.”

Finally, they contended, that conceding, for the sake of the argument, that the testatrix was not constituted

constituted by the will of her testator absolute owner of the property, but that she was a trustee with a power, still she had duly by her disposition of it fulfilled the trust and properly exercised the power by the selection of the devisees named by her and appointed to take under her will. On the other side (they anticipated) it would be insisted, that the Plaintiff created tenant for life by the will, was not an heir of the testator, but living his mother, he was only the heir expectant of a presumptive heir; but the question on that part of the case they submitted was, whether (the testatrix having a power to execute) the Plaintiffs were proper objects of the power; in other words, whether they answered the description in the will of the testator, of persons intended to take the beneficial interest after the death of the testatrix, in the words of the recommendation by which the trust was raised: and they insisted that the power had been in all respects properly executed as to the disposition of both the real and the personal estate.

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*Trower* appeared for Miss *A. A. C. J. Pigott*, and other formal Plaintiffs.

*Agar* and *Wray*, for Mrs. *Jenny Pigott*, and

*Clarke* and *Hayter*, for the trustees, on the part of the several Defendants.

*Jervis*, *Shadwell* and *Sugden*, for Defendant, *J. Calcraft*, and

*Fonblanque*, *Martin* and *Boteler* for the Defendant *Henrietta Arabella Meredith*.

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They submitted that the question of a trust in Equity being raised by the words of recommendation, if they stood alone, on the authority of the case of *Kirkbank v. Hodson* (a), being conceded, the next question would be, whether they were nullified by the subsequent words in the clause; and they contended, that they were not, on the principle that a clear trust must be executed if it can be found in a will. *Pierson v. Garnet* (b).

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They also insisted that there was no uncertainty in this case, either in the objects or subject of the trust raised by the devise. The subject was the testator's whole estate, the objects his heirs; and that there could be no uncertainty in the word heirs, being a word of very particular and positive signification in English law:—that the power given to the testatrix to dispose of a part to Miss *Pigott*, a portion, though at discretion, of the testator's real estate, did not destroy the certainty of the subject of the trust as to the whole, as had been contended, and they distinguished the devise in the present case from that in those which had been cited on the part of the Plaintiffs by the circumstances of the state of this family, the positive and strong terms of the trust, the nature of the property, and the manifested intention of the original testator.

*Wetherell* replied ; and

The cause at the conclusion of the argument was ordered to stand over for Judgment till the


(a) *Ante*, vol. vii. p. 212.

(b) 2 Bro. 38, 226.

following

following term, which was now delivered seriatim by the Barons, there being a difference of opinion, as follows :—

RICHARDS, *Lord Chief Baron*:—The bill in this cause is filed by the devisees in trust under the will of *Arabella Walker Heneage*, who was the widow of *John Walker Heneage*, Esq. against the two coheirs at law and the next of kin of Mr. *Heneage's* Father, *John Walker*, who are the coheirs and next of kin of Mr. *Heneage* himself.

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I conceive this to be a sufficient description of the Defendants for the purpose of the present consideration.

The controversy arises upon the will of Mr. *Heneage*, and the question is, whether, under his will, Mrs. *Heneage* took the absolute interest in his real and personal estates, and had therefore a right to dispose of them in favour of the Plaintiffs, as she has by her will declared her intention to do; or whether she was only a trustee with an interest in herself merely for her own life, as trustee for the benefit of the Defendants or some of them, with a power of selecting some or one of them in preference to the others or other of them. I use the word *personal* estate, because it is used by Mr. *Heneage* in his bequest, and it must therefore be necessary, in the construction of his will, to observe upon the personal estate, though his personal estate was, as appears by the Master's report, insufficient to pay his debts, and the *decision* must be confined to his real estate.

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This question must be resolved by a due attention to the language of Mr. *Heneage's* will.

What then is the true construction of all the words he has used? Do they impose a trust on Mrs. *Heneage*, and are they *imperative* upon her with respect to the disposition of the property? Or do they import more than the *wish* of the testator, that if she has no serious disinclination, she should dispose of it to or amongst his father's heirs, leaving it to her own option, however, to deal with it as her own?

The question  
one of construc-  
tion with refer-  
ence to inten-  
tion.

It must be admitted that it is purely a matter of intention, to be collected from the words of the instrument, as in all other cases upon wills, where no rule of law interferes.


Principal autho-  
rities.

It is not necessary to travel through all the cases which have been furnished by the great industry, and urged with the great ability of the learned counsel successively on both sides. To some of them I shall shortly advert. Lord *Alvanley*, when Master of the Rolls, in *Malim v. Keighly*, has extracted and stated the result of all the cases before that time, (and the subsequent cases have, it seems to me, made no alteration); he states the result in the following manner:—"Wherever any person gives property, and points out the *object*—the property—and the *way in which it shall go*, that *does create a trust*, unless *he shews clearly that his desire expressed is to be controuled by the party, and that he shall have an option to defeat it.*" That is a case we all know: it is in 2 Ves. junr. 335.

I will



I will not stay to inquire whether the language of that very learned and excellent judge is very accurate and critically correct, as applied to the cases, (but I believe they are the very words his Honor used,) I think, however, that the result as stated by him is sufficiently correct for the present purpose, and I shall consider the passages in the will accordingly; and I confess that I feel myself bound by the doctrine delivered in it, as being generally consistent with the decisions that have prevailed.

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But I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most, of the cases the construction was not adverse to the real intention of the testator.

It seems to me very singular that a person who *really meant* to impose the obligation established by the cases should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself and to the professional or any other person who might prepare his will. In considering these cases it has always occurred to me that, if I had myself made such a will as has generally been considered *imperative*, I should have never intended it to be imperative; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer these whom  
 I post-

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I postponed to him, and who next to him were at the time the principal objects of my regard.

I am happy to be enabled to state, that in this opinion I have the concurrence of a noble Judge, than whom there has never been, and I believe, never can be, a person more active and acute in investigating the principles of the Law in all its bearings, or more extensively learned on every legal subject (a).

In *Wright v. Atkyns*, 1 Ves. & Beames, 315, the present Lord Chancellor says, “ *This sort of trust is generally a surprise on the intention*, but it is too late to correct that.” Again, (he says,—we know the question was, what the word family meant—) “ I do not believe *that the testator intended a mere trust, but that must be the construction, if the word ‘FAMILY’ is properly construed.*”

I have said so much, as a justification, or rather the foundation, of the opinion which I entertain, that, though I hold myself bound by the decisions and obliged to follow them, I do not consider it to be my duty to *extend* the rule of construction which has been adopted in them, and to add to the number of those where the Court appears to me rather to have *made* than to have *given effect* to the *wills* of testators.

Now as to Mr. *Heneage’s* will.

(a) Lord *Eldon*.

It

It devises all and singular his real estates, in the clearest language, to his dear wife *Arabella Walker Heneage*, her heirs and assigns.

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And he bequeaths all his personal estate to her, her executors, administrators and assigns. Thus he gives all his real and personal estates to her absolutely.

Then he proceeds:—"And I earnestly recommend to my said wife the care and protection of my affectionate friend *Arabella Anne Caroline Jenny Pigott*, most heartily beseeching my said wife that she will permit and suffer the said *Arabella Anne Caroline Jenny Pigott* to live and reside with her, and that she will afford to the said *Arabella Anne Caroline Jenny Pigott* the same kind attention and tenderness which has been always shown her in my lifetime. And I seriously and warmly entreat my said wife, at her decease, to settle and assure to two trustees such part of my real estate as she shall think proper for the special purpose of securing to the said *Arabella Anne Caroline Jenny Pigott*, during her natural life, (in case she survives my said wife, but not otherwise,) such an income as will enable the said *Arabella Anne Caroline Jenny Pigott* to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife." The words "recommend and most heartily beseeching," in the first part of this clause, are emphatic as coupled with the rest of the passage; but the subsequent

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words—"I *seriously* and *warmly entreat* my said wife at her decease to settle and assure to two trustees *such part* of my real estate, &c. (those words are unquestionably sufficient to create a trust, and are imperative unless other words are inconsistent with such a construction)—such part of my real estate as *she shall think proper* for the special purpose of securing to the said *Arabella Pigott* during her natural life, (in case she survives my said wife, but not otherwise,) such an income as will enable the said *Arabella Pigott* to enjoy all those comforts of life which she has been hitherto used to, leaving the amount of such income to the entire discretion of my said wife,"—must be taken to explain at least, if not to qualify and controul, that by which it is preceded.

It has been accordingly admitted by some of the Counsel for the defendants, that this clause is not imperative upon Mrs. *Heneage*, but leaves to her discretion to provide for Miss *Pigott* or not, as she may think proper. I take the admission to be perfectly correct; and I conceive it to be very clear that Mrs. *Heneage* was left to act at her own option.

It is true that some of the words in this paragraph would indisputably be imperative if the rest of the sentence were constituted in a different manner from what it appears to be, but Mrs. *Heneage* is desired to settle and assure *at her decease* (and not sooner) *such part* as she shall  
*think*

*think proper*—the amount of such income to be left to Mrs. Heneage's entire discretion.

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Nothing can shew more satisfactorily than this clause does the anxious and affectionate desire of the testator to secure a *proper* provision for Miss *Pigott*, and it may, perhaps, require some attention to prove that the testator *shews clearly* (as Lord *Alvanley* states it) *that his desire expressed is to be controuled by Mrs. Heneage*. Yet, without entering into minute circumstances in the clause, let it be recollected that, if it import a trust, Miss *Pigott* must be entitled to a provision independently of Mrs. *Heneage*, and that Miss *Pigott* would have a right to call upon the owners of the estate to perform that trust if Mrs. *Heneage* had died without making the provision so much desired by Mr. *Heneage*. But I apprehend that Miss *Pigott* would fail in asserting such a right, for the provision was requested to be at the discretion of Mrs. *Heneage*. That could not be exercised after her death, and a court of equity could not have assisted, for it could not act on the discretion given to Mrs. *Heneage*, which was *personal* to her: and I believe courts of equity do not interfere in cases of such discretion where it is intrusted, except in the case of charity, which has always been considered as an excepted case.

A trust in equity under a will cannot be set up after the death of the person to whose discretion it had been referred to perfect it, by settling and stating the amount of the benefit to be conferred, because such a discretion is personal.

But the case of a charity forms an exception to that rule.

Another reason will occur, to which I shall presently advert, which confirms my opinion on this part of the will.

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I shall only observe for a moment, that the words “*I seriously and warmly entreat,*” &c. in the clause respecting Miss *Pigott*, though very amply sufficient to raise a trust in a proper place, are used by this testator where, if my construction is right, they were not to imply a trust; and this consideration may be applied to other words of the like import, unless the accompanying words in the clause where they occur prove the intention to create a trust.

The testator then proceeds in these words: “I have devised and bequeathed” (we have seen that he has devised and bequeathed all his real and personal estate to Mrs. *Heneage*) “the whole of my said real and personal estate hereinbefore particularly set forth, unto my said dear wife (and which she must acknowledge not to be inconsiderable);” by which I conceive he must refer to the interest which the former part of the will had given to her, viz. the absolute interest in the whole and from the quantum of which he seems to demand her gratitude.

“I have devised, &c. unfettered and unlimited.” Here, to recur to what I alluded to before, it seems evident that he had not intended to encumber his widow with any imperative trust for Miss *Pigott*, for these words “unfettered and unlimited” refer to all the estate he had to dispose of at the instant; and it seems to me difficult to say that when he used these words in this place he could have had it in his contemplation to  
confine

confine her interest, which before had been given to her without limit, to a mere estate for life, with only a power of selection amongst others for the remainder. Then he adds the important words which create the difficulty in this case, and a very serious difficulty it is: "I devise (&c.) in full confidence and with the firmest persuasion that in her future disposition and distribution thereof she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference."

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The words cre-  
ating the diffi-  
culty.

Unquestionably these words are extremely strong, but when you connect them with the other words, as you must in construing the instrument, I doubt much whether they do more than only import a *wish*, and not impose a *command*, on the part of the testator.

It has been held, and must, I think, be admitted, that if an intention appear in any part of the will to give to the devisee a right or power to spend the property, words of equal force with these words would not be *imperative*; for the Court, in its astuteness to extract the meaning, conceives it to be inconsistent with an intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure, and, by using that privilege to any extent, leave nothing or more or less to remain the subject of a trust.

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In this case the devise and the words “ unfettered and unlimited,” which are used by the testator to shew his opinion of the extent of the interest devised, are certainly large enough to manifest an intention to convey the absolute dominion to the party, as if words had been used more directly authorizing her to spend it, or to deal with it as she pleased.

Again:—The testator seems in this paragraph to look back on the devise and bequest to his wife with a complacence, and something like a boast as if he had conferred upon her an obligation with respect to property as great as he was capable of doing, and had cast upon her a matter of as great bounty as he could—for he describes it as a bounty *unfettered* and *unlimited*—and appears to observe upon it as entitling him to call for her gratitude, and to request her kindness to his father’s heirs; and yet in the same breath, if the Defendant’s construction is just, he *fetters* and *limits* the same property to a very great extent indeed; and instead of allowing her to retain the absolute interest which he declared he had given her unlimited and unfettered, he reduces her to a tenant for life only, with a trust or power to appoint the remainder to such of the heirs of his father as she might prefer—objects not of her blood, and strangers to her in the eye of the law.

I confess that in my view of this instrument there is so much inconsistency and so much internal evidence, that I have persuaded myself that  
 the



the testator has not sufficiently exhibited his intention to impose an imperative trust on his wife, and that, on the contrary, he has given her all his property, real and personal, absolutely: and the more particularly where the intention is to be extracted from *all* the words of the will, without any reference to any rule of law; for the heirs take nothing as heirs, but they take merely as devisees, as much as if they were strangers.

If I am correct in my opinion on this point, it is needless to proceed further; but as it may be, and I am not without serious apprehension, when I am apprized of much better judgments than my own, that I labour under a mistake, though I certainly have taken all the pains I could to consider all the cases which have been adduced, and all the arguments which have been urged; but still, since I may nevertheless be mistaken, as I have said, upon this point, it is necessary I should proceed to the next question to be considered, which is, whether, if this be a trust, the objects are sufficiently pointed out. They are described as the *heirs of the father*; who are the persons intended by that description? A great deal of argument has been employed upon this subject on all sides, some insisting that the heirs at law of the testator's father, at the time of making the will or codicil, or at the time of his own or his widow's death, were meant; whilst others contend, that the next of kin of the testator, at some or one of those periods, were, either together with or exclusively of

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of the heirs at law, the objects intended by the testator.

I think it is difficult to suppose that he meant any but those who answered the description of his objects at the time of his wife's death. For as she had the whole period of her life to appoint in, the testator probably contemplated those who should answer the character marked out at her death. In that case, or if he alluded to his own death, he could have had no individual object or objects in his view, for he could not conjecture who might survive himself or his widow. And I own it appears to me, that if he had disposed of only real estate, and it were to be held a trust, his heir or heirs at law, at the time of his widow's death, would have been the persons intended, the one of them, if there should be more than one, to be preferred to the other or others, at the option of the widow.

But by this will all his personal estate is given as the real estate is. And though, as I said before, it appears by the Master's report that the personal estate was all exhausted in paying the debts, and therefore that there was no personal estate left to pass by the bequest, yet in considering the will we must construe it as if there had been any given amount of personal estate.

No doubt, if it appears that the intention of the testator was to have directed an appointment of real and personal estate to the *heirs* at law, technically

nically speaking, there would be no sound objection to the execution of such intention. But my doubt is as to there being a sufficient declaration of such intention expressed by this will, or necessarily to be implied from the general tenor of it; and I am not capable of ascertaining satisfactorily to whom, under the expressions used in the will, the widow, if she was a trustee, was to have appointed; and the Court is now placed in that difficulty. For as the widow (if she be a trustee) has made no appointment according to the trust, the Court is to declare who the objects are, or, in other words, who take the remainder under Mr. *Heneage's* will. Supposing Mrs. *Heneage* to be under the primary disposition only tenant for life, with remainder to other persons, whoever they may be, to whom, in that case, I would ask, ought the Court to decree both the real and personal estate? Could they be satisfied that, by the language used in this will, the testator has pointed out the *heirs at law* of his father as the objects to take the personal as well as the real estate, or the heirs and next of kin, or the next of kin only?

I confess that I should feel myself greatly embarrassed in arriving at a decision upon this point; and if the objects be not certain, there is no trust imposed on Mrs. *Heneage*.

But my opinion is formed mainly on the former point, though I have great doubts as to the latter. I have thus taken the liberty of stating some of the

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the reasons which influence my judgment in favour of the Plaintiffs—in a case where the intention of the testator, extracted as it must be from *all* the words of his will, must govern—where I think the intention ought to be clearly and satisfactorily expressed—and the more especially as in my opinion, strengthened by that of a very great Judge, “the decisions upon this subject have been in general a surprise on a testator.” And never in any case so much as in this—for this is in species a perfectly new case: there has been none resembling it, that ever I have met with or heard of. This is a case where we see that the testator ostentatiously proclaims to his wife that he had given her, and meant to give her, the absolute interest; and yet I am required to attribute to him a covered meaning, from whence it is to be inferred, and only *inferred*, that he in fact gave her only an interest for life—something like a species of fraudulent dealing, of which the testator would not, I think, have been guilty, and such as we ought not to attribute to him. For these reasons I am of opinion that we must declare in favour of the trusts of the will of the testator.

[*Baron GARROW* being called away by the necessity of attending elsewhere, according to the routine of his judicial duty, stated shortly in substance that he concurred entirely in the opinion and reasoning of the *Lord Chief Baron*.]

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GRAHAM, *Baron*.—When a case like this presents itself to the mind of a Court composed of several Judges, it is extremely difficult that all should

should concur in the same view of it, at the same time. When I begin by saying that I myself differ from my Lord Chief Baron in the view which he has taken of the subject, I am justified in some measure by those very doubts with which his Lordship has accompanied his own opinion.

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Entertaining as I do a different view of the case, and putting a different construction upon the words which occur, in order that if I am wrong the reasons upon which my opinions are founded may be distinctly and clearly known, I feel it a kind of duty, and I trust that the courtesy of the Court will be extended to me so far, as that I may be permitted, without trespassing too much upon its valuable time, to state, and I hope with no great prolixity, the grounds of the opinion I have formed.

The first and the most important question is, whether the words in this will create a trust? That is a question purely of equitable construction, and in order to come at that question it will be necessary for me to take a cursory view of the cases which have led to the principle which at the present time seems to govern the Courts of Equity in the construction of wills of this nature, and when I do that, I very freely confess I am under some apprehension that my own judgment is enslaved by the cases which I find decided upon the subject.

I will mention particularly the case of *Harland v. Trigg*, which is in 1 *Brown*, 142; many cases of the

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the same kind had been decided in the time of my Lord *Hardwicke*, and in the time of a very excellent Equity Judge, my Lord *Henley*, but the principle which seemed to lie as it were at the surface of those cases had scarcely been reduced to form till the period of the case to which I now point, and there my Lord *Thurlow*, with the precision and the anxiety to extract clear principles which were peculiar to him, seems to have applied to all cases in which these imperfect and doubtful expressions are found, and he has laid down rules by which they are to be converted into a trust, in language which has in a great measure governed the subsequent cases. That principle, as he expresses it, is, that where the subject of the devise is ascertained and the objects distinctly pointed out, words expressive of a request or desire, though short of an express direction or trust, are construed to have the same effect as a trust declared. This principle I may, I think, state to have been observed to the very latest case that arose but the other day on Mrs. *Crackenrode's* will, the case of the Bishop of Durham. In *Pierson v. Garnet*,—where almost all the cases were particularly referred to in a very laborious as well as ingenious argument of Mr. *Ambler*, in 2nd *Brown*, pages 38 and 226—the case was a disposition of personal estate, and there the interest taken was expressly made to be for life: the words expressive of the implied trust were very slight, scarcely amounting to a trust, but they were held to amount to a trust, upon the application of the principle to which I have referred.

referred. Then with respect to the object, it was "that the said *Peter Pierson* do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt, *Ann Coppinger*." My Lord *Thurlow* concludes his opinion in these words, "If the word used had been relations, it would go to those (who were next of kin) within the Statute of Distribution," so it had been determined in 1st *Peere Williams*, 397, "but under these words it goes only to such relations as are descendants (of *Ann Coppinger*)," which is more narrow. My Lord *Thurlow* therefore, in this case of *Pierson v. Garnet*, having canvassed the subject distinctly, held that those words "it is my dying request," were tantamount to a creation of a trust.

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In the case I first referred to, of *Harland v. Trigg*, the devise was of a mixed kind, it was of leases for lives and leases for years; the words of bequest are "all other my leasehold estates in the township of *Sutton* I give to my brother *John* for ever;" the expression therefore was extensive, it gave him an absolute estate; and the argument was exceedingly strong that he meant it should go to his brother *John* as far as the estate could go; for *John* was the next tenant in strict settlement, after himself, of the family estate; but notwithstanding that argument, and notwithstanding the devise to him of freehold as well as leasehold for lives, the words, "hoping he will continue them in the family for ever," were considered as tending to establish a trust. My Lord  
 Chan-

devise to her was afterwards qualified in the manner I am about to state. The testator, in the very clause which controuls the power which he had given to his daughter, uses these very remarkable expressions, though his meaning was to give his daughter the absolute disposal of the collieries, he requested her, that if she should execute her power by a sale, the money arising therefrom should be applied as he had directed the same. In default of her appointment, Lord *Henley* held, that the absolute power so given to her was afterwards qualified by the clause containing his particular request, that if she should execute her power by the sale of the estate, the profits of that estate should be reinvested in land, and settled as was the bulk of his property.

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We come then to the particular case before us, and, in looking at the will, the words which are particularly insisted upon are those which have been, it seems, considered to import that he gave her his estate altogether, in the most absolute sense, and he gave it to her unfettered and unlimited. Those words, most undoubtedly, are strong, but what could he do more when he had given her the fee? Both these expressions, “ unfettered and unlimited,” were absolutely necessary to the execution of the power he had given her. The provision to Miss *Pigott* is confined to her situation in life, to the habits in which she had constantly lived in his, the testator’s, family; and the utmost which could be given to Miss *Pigott* out of this property so disposed of, was an estate for life; but it is quite clear that the family estates remained,



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remained, and was intended to remain, unimpaired and entire; and Mrs. *Heneage* could not dismember that estate, because by the words of the will it was to pass together and entire to such of his father's heirs as she should think best deserving her preference. Then as to the controuling words, it should be observed, that they are not merely "unfettered and unlimited," but "unfettered and unlimited, in full confidence, and in the firmest persuasion that in her future disposition and distribution thereof she will distinguish the heirs of my late father." According to my apprehension, no argument arises to diminish the force of this expression, from any uncertainty in the object, for both parties agree they are sufficiently demonstrated; the one says they are the heirs at law, properly so called, and the other, that they are all the remote descendants; but whether male or female, the Counsel for the Plaintiffs have not in the course of their arguments explained.

Then we are to consider, in the first place, the force of these expressions. What is in point of equity a trust? It is a confidence. To my apprehension, the words "full confidence" are synonymous with trust, and tantamount to saying, "I give it in trust." Trusts, as adopted in our law, we know perfectly well, are taken from the Roman law, *fidei commissum*, a duty imposed upon the good faith, upon a confidence, in the party. The term *fidei commissum* is literally copied by the Greek civilians, and we have taken it up, adopting these *fidei commissa* as trusts; and it is no longer,  
 nor

nor was it at the time when it was made, the subject of equitable jurisdiction and imperfect obligation. It was rendered a perfect obligation by the authority of the Prætor, and our Courts of Equity, in adopting these trusts, have carried them into execution as absolutely binding on the conscience. Then the question we have to consider is between the words trust and confidence. What is confidence? fiducia: that is the strongest expression you can make use of to create a trust here. I am, perhaps, going a little out of my way when I refer to authorities not in our books. One of the most critically accurate, though later classical writers, marks the distinction and the different degrees of efficacy between hope and desire or wish and good faith or confidence: he marks the highest degree of trust and confidence that can be reposed in a person when he uses the words “jam de te spem habeo nondum fiduciam.”\* Now I do not mean to say that this does not leave the matter open to the argument of my Lord Chief Baron, which may be very powerful, and which should overrule any impressions upon my mind. Though I say that both parties agree that the objects were designated, they agree only because each puts his own sense on the words, and therefore it may fairly be argued that the object was uncertain; because one side argues that the persons are the heirs at law, properly so called; the other, that they are the descendants of the father; and so far they may be said to leave the object in uncertainty; but if by law or equity the sense is fixed, there is no uncertainty. That brings me

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\* Sænic. Epist. 16.

ing to the construction on the one hand or the other.

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Let us look then at the state of the family\* at the time the testator made this will. It is not necessary to trouble the Court with particular names; the will was made about 1796. At the time of making the will the testator had two sisters, *Mrs. Meredith* and *Mrs. Calcraft*; they were equally not only his own heirs at law but the heirs at law of his father. No argument, according to my apprehension, arises from the circumstance of his directing his estates or recommending his estates to go to his father's heirs in preference to his own. Probably for some reason (which does not appear in the case) he might bear in mind that the estate originally coming from his father the father should be considered as the common stock from which that estate should be derived to the descendants. At the time of making his will he had these two sisters. At his death his sisters were both dead; but *Mrs. Meredith* left an only daughter, and *Mrs. Calcraft* had a son, who is one of the present defendants, and two daughters. At *Mrs. Heneage's* death *Miss Meredith* was still alive, and her cousin, *Mrs. Calcraft*, was likewise alive, and *Mrs. Wyld*, who was a sister of *Mrs. Calcraft*, (and one of whose sons is an object of the will of *Mrs. Heneage*,) had at that time a very large family. This, therefore, was the state of the family at the death of *Mrs. Heneage*. *Mrs. Meredith* and *Mrs. Cal-*

\* See Pedigree, *ad fin.*

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*craft* were, strictly and properly speaking, the heirs at law.

Then the first arguments arise from these expressions in the testatrix's will: "And whereas I have bequeathed the whole of my said real and personal estate, hereinbefore particularly set forth, unto my said dear wife, (which she must acknowledge not to be inconsiderable,) unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father." It is argued that those words, "distinguish the heirs of my late father," must mean that she was to single one of many out of the descendants. I really do not feel that argument to be so cogent as to give a new interpretation to the expression of "heirs," for that is a clear designation; and the word "distinguish," in this clause, would strictly apply to a distinguishing between one of two, as well as of three or four, or more; the word appears to me to carry no necessary evidence of intent one way or another, and the difficulty I have felt all along is, that where persons who really do strictly answer the expression are in existence, it is a very strong construction to put upon the will that those persons who strictly answer the description shall be passed over, to make way for those who in no proper sense, and in no sense I venture to say, could be denominated the heirs at law of the testator whilst the others were alive.

A passage has been cited—and I feel a degree  
of

of regret at going through it, at the same time a respect for the knowledge employed in the research of this subject seems to require it at my hands—a passage has been cited from *Bracton*, lib. ii. p. 64, which I think, nay, I cannot but feel a perfect conviction (with great deference I say to the Counsel who urged ~~it~~) has been misapprehended. *Bracton* is speaking there of different descriptions of children, and then he comes to a description of heirs, and he says—"Item eorum (hæredum) quidam incipere possunt esse hæredes et disinere, et quidam non." That is a very common and a very obvious case; a man may have a daughter, and after a son; she is not heir before the birth of a son, but she has a sort of inchoate right; when the testator has a son she is no longer heir-apparent, and that incipency is totally destroyed. Then comes the passage more particularly relied upon—"Item eorum qui sunt naturales, legitimi et hæredes, quidam sunt propinqui et quidam propinquiore." To be sure the son is nearer as heir of his father, the grandson next, and so on, "et quidam remoti et quidam remotiores." Now here is the part where I think the learned Counsel who quoted it was mistaken—"et omnes quotquot sunt, sint hæredes recti et justii quotquot descendunt gradatim a communi stipite primo per lineam directam descendentem in infinitum et postea per lineam transversalem." Now observe here "communi stipite primo per lineam directam deinde in linea transversali." Is it possible for any body to understand that *Bracton* meant to say, that all those to the remotest of a man's posterity "a communi stipite"

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*Shadwell's* argument, in referring us to the register, puts that out of all doubt; that where there are several coparceners they are in the correctest of all pleadings, the writs of formedon, styled Heredes, as in the Register, 239, "that the sheriff should render the estate "*quod R. dedit M. et hæredibus quos idem R. de corpore ipsius M. procrearet*"—that is, in special tail, not to himself, but to his wife and to the heirs which he should procreate on her body. Then the writ goes on to say, "*et quod post mortem M. de corpore suo per R. procreatæ,*" and accordingly, without troubling the Court with the particular words of it,—that *M.* was dead—that she left a daughter, who died leaving a daughter, that she left a surviving daughter, and therefore it claims that the estate should be restored to the surviving daughter and her niece, the daughter of the deceased daughter, and styles them particularly *hæredibus ejusdem M.*, that is to say, the daughter and the niece, the heirs of *M.*

Then take the next instance, in the same page, where the estate goes to a nephew or a niece of a deceased daughter, "*consanguineis et hæredibus,*" calling them *hæredibus*. Another, where were four daughters, and one died leaving a son, where it was to the son *consanguinis* and the daughters *hæredibus ejusdem*. I have dwelt long enough upon this to show that the word heirs here may very properly apply to those two persons who claim, though in point of law they constitute but one heir of the testator. Cases have

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have been referred to, which appear to me to be perfectly misapplied. I mean the cases from *Archer's case*(a) down to the case of *Lisle v. Gray*(b); those were all cases of exceptions to the rule laid down in *Shelly's case*. The words heirs, or heirs male, or heirs female, are all generally construed, we know, as expressive of the quantity or quality of the estate. The question in these cases is, whether those words which, by the general effect of that decision are considered as descriptive of the duration or quantity of the estate, shall, by force of the intention, be construed as a description of the person to take. But all those cases suppose that *constat de persona aliunde*. Before you enter into the question you must suppose that the person claiming sustains the character; no person can claim without qualifying himself, and stating himself or herself to be either the heir or the heir male, or the heir female, or coming under the description of heirs, or, in the greatest latitude, as heir apparent. In all those cases that is clearly ascertained; and the word heirs is always taken in the proper sense, and no person can claim this future interest but by showing that he was the heir. Several cases might, perhaps, more illustrate the position, but it is quite enough for me to show the inapplicability of those cases to the present question. My great difficulty, and the thing that imposes, perhaps, upon my understanding is, that where these words are used, which are so very strong, so much more strong than those used in any case before, where the object is certain, where a man has

(a) 1 Co. 66.

(b) 2 Lev. 223.

imposed

imposed a duty in the fullest confidence on his wife, giving a vast estate and the prodigious influence belonging to it, that language so strong should impose no trust, and that a woman might go to any pitch of indiscretion to which female weakness might be liable, and make the most extravagant and the most absurd disposition of this family estate, without any regard at all to these strong words, as by giving it away to some silly charity, that is the first thing that strikes me as a difficulty; then the next is, we have been a long time in doubt whether these words create a trust or not, how should we deal with it. Suppose the first question had been put out of all doubt, and he had said, in plain terms, I give you the estate to you and your heirs; I give you the estate to you and your heirs for ever; I give you the estate unfettered and unqualified, but at the same time I do it upon this special trust, and for this purpose, that you distinguish some one of my father's heirs. Suppose in such a case the Court were called upon to say, What is the meaning of those words, "to the heirs of my father?" In the first place here are persons who are the heirs of his father; then, why are you to desert the regular, plain, and proper sense, unless you are driven to it, I do not say by necessary implication, but by the strongest cogency arising upon the face of the will? Then, I say, what is there upon the face of this will that goes to show that this man, who has used an appropriate and proper expression, whose appropriate and proper expression has its proper application to persons sustaining this character,

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racter, what is there to drive you from giving to those words their appropriate sense? At this moment I do not know what he meant, if he did not mean this. Did he mean descendants of any description? Did he mean that any grandniece should take the estate out of the family immediately? It seems to me that the very circumstance relied on as an argument to take from the word its proper sense, goes the other way; it rather induces me to say, I will abide by the proper sense; therefore really, under these circumstances, I have a great deal of difficulty in giving those words any but their appropriate sense, and I think the meaning of the testator was this—I give it to my wife, her executors, administrators, and assigns for ever; but, at the same time, I mean to qualify the devise, and I do it in the power which I give her; I give her a power by her will, duly attested, to dispose of it to such of my heirs at law as she shall prefer. I would ask if this were a legal estate, with a power to dispose of it in these terms, what would a Court of law say if she, having such a power, gave the estate to a remoter descendant, passing by the heirs at law? In my opinion a Court could not suffer such a disposition to stand.

I have felt it my duty to state the reasons which decide my mind. I hope I have done so with a proper deference to opinions of greater authority. My Lord Chief Baron does me the honour to include me in the number of those for whose opinion he has upon the present occasion expressed  
a respect.

a respect. I feel that it becomes me to return the compliment—I will not say compliment—I speak it with truth, that I am, as I ought to be, more affected by the inclination of his opinion the other way, but I have felt it my duty to declare my opinion such as it is, and I am sure I shall be the last man in the world to say that it will turn out to be a correct one.

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I am consequently of opinion, for the reasons I have given, that part of the testator's property having been improperly disposed of by the testatrix, we ought not to decree that the trusts of her will (so far) should be ordered to be performed; but that the bill in that respect should be dismissed.

WOOD, *Baron*.—This is a case of great difficulty, at least to me. The testator has by his will given his real estates to his wife, her heirs, and assigns for ever; he has also given all his personal estate to her, her executors, administrators, and assigns for ever. Those words most undoubtedly by themselves give her the absolute ownership in both real and personal estate, but afterwards in the will there is a clause which has created all the difficulty; that clause I will take the liberty of repeating. He has, after making a provision for life for Miss *Pigott*, gone on in these words—"And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth, unto my said dear wife, (and which she must acknowledge not to

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to be inconsiderable,) unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate together and entire to such of my said father's heirs as she may think best deserves her preference."

Now what is the true construction and operation of this clause? Does it leave it entirely at the discretion of Mrs. *Heneage*, the wife of the testator, to give the estates to whom she pleases, whether of the testator's family or not? If that be the true construction of the clause, all difficulties are at an end. His will must then stand good in every part, and one would wish that it might, because it seems to me to fulfil what appears to have been the testator's intention as to his own family. On the other hand, it is contended that this clause *creates a trust* in Mrs. *Heneage* to devise and bequeath the whole together and entire to such of the heirs of the testator's father as she might think most deserving.

To examine into and comment upon the multitude of cases which have been cited, would be a most laborious and, perhaps, useless task. I shall content myself with saying, that it is my opinion that the clause *creates a trust* in favour of the testator's father's heirs, and I shall consider afterwards who are included under the denomination of father's heirs.

Stripping

Stripping the clause of a great deal of circumlocution meant civilly towards his wife, it is in substance a declaration that he has given his real and personal estates to her in confidence that she will devise and bequeath the whole together and entire to such of his father's heirs as she may think best deserves her preference. Words of recommendation, desire, or request have been held to create trusts; confidence is much stronger, it is emphatically a word of trust. Having in the early part of my legal life been much accustomed to conveyancing, I recollect that trust and confidence in conveyances are always used as synonymous terms, and in general a trust is introduced in this way, "in trust and confidence" and "to the intent and purpose that the trustees" will do so and so. I had also some recollection that confidence was used as synonymous with trust, in the Statute of Uses of the 27th Hen.VIII. cap. 10, commonly referred to by conveyancers as the statute for transferring uses into possession. On looking into that statute I find that in reciting the mischiefs which occasioned the statute, it recites that fraudulent assurances were made to uses, confidences, and trusts, and in several parts of the act these words are used—use, confidence, or trust. And it enacts, "that persons shall have such possessions and seisins as they had before in the use, confidence, or trust of the same lands," so that the legal sense of confidence has at all times, as I apprehend, been considered as synonymous to trust. Then supposing this had been read instead of confidence, substituting trust, which

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he shews clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." The word recommend proves desire, and does not prove discretion. If a testator shews his desire that a thing shall be done, unless there are plain express words or necessary implication that does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a "trust;" and when that case came before the Lord Chancellor he lays down this—"when one person recommends to another, who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility." In this case, most undoubtedly, what he has done is this: he has recommended to her, whom he had a right to order to do it, because it was his own estate, and therefore he had a right to direct her to dispose of it as he thought fit; and, therefore, these words, supposing they do not mean a trust, would, I think, be quite sufficient, from which a trust would be created and implied.

It has been argued that the words "unfettered and unlimited" exclude the idea of any trust. It does not strike my mind that that is the true meaning of them; it seems to me that he meant this—I have imposed no fetters or limitations; I leave it to my wife to do as she pleases, only let my estate go together and entire to my father's heirs, she having the choice among them.

Then

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Then this brings me to the next question, and which most undoubtedly is a very difficult question—Who are designated by or meant under the denomination of his father's heirs? It is contended, on the part of Mrs. *Meredith* and General *Calcraft*, that they were the nearest heirs, as well of the testator as of his father, at the death of the testator, and also at the death of the testator's widow, and that they are the persons meant as heirs of the testator's father, one of whom is the object she ought to have selected, and that not having done so, the will she has made is a void execution of the power, and they must take as co-heirs of the testator equally. That I apprehend is not the true construction of the word heirs. If it had been his meaning to confine his wife's selection to his father's next or nearest heirs, he would have said so; and knowing there were but two, he would also have said such one of my father's next or nearest heirs as she shall think best deserves her preference; but I think he meant, by the generality of expression, to give her the selection out of all the existing heirs or descendants of his father, whether immediate or remote, as a class of persons from whom she was to select, which is tantamount, as it appears to me, to saying all the descendants from my father. She has limited the real estate to the great grandchildren of the testator's father, which appears to me to be a good execution of the trust or power vested in her; she has given it to them whole and entire, to succeed one another in tail, with the reversion in fee to *Francis John St. Quintin*,

*Quintin*, who is also in the father's paternal line of descent in the same degree as those to whom she has limited it in tail.

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ANDOVER  
and othersJudgment,  
Wood, B.

It has been said, though not much pressed in argument, that she had no power to entail: Now I conceive she had, provided the estate went whole and entire from paternal descendant to paternal descendant, and, therefore, I am of opinion that she has executed this power properly. I think the construction and explanation of the general term heirs, in *Coke Littleton*, p. 9, as including all immediate and remote who may become heirs, is the true sense of the term heirs, in the clause which has been referred to in *Coke Littleton*, p. 9; and in explaining the extent of the word heirs, he says, "These words (his heirs) do not only extend to his immediate heirs, but to his heirs remote, born and to be born." That is the sense I put upon those words in the will of this testator. Then he goes on, "Sub quibus vocabulis (hæredibus suis) omnes hæredes propinqui comprehenduntur, et remoti, nati et nascituri. And hæredum appellatione veniunt hæredes hæredum in infinitum." So that I think this testator meant to leave it in her power to dispose of this estate entire to some one of those heirs, immediate or remote, at her death; and I think she has properly executed that power so far as respects the testator's real estate. How this matter, according to that construction, will stand as to the testator's personal estate, I am not prepared to offer any opinion, but I apprehend if the trust is well executed as

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HENEAGE  
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ANDOVER  
and others.

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to the disposition of the real estate, that at all events must stand good, whatever becomes of the personal estate.

I am, therefore, of opinion that the bill must be supported by decreeing performance of the trusts.

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The Court upon that judgment pronounced the following

### DECREE.

Decree dated  
23d May, 1822.

That the trusts of the will of the testator *John Walker Heneage*, and the trusts of the will and codicils of the testatrix *Arabella Walker Heneage*, respectively, ought to be performed and carried into execution, and did order, adjudge, and decree the same accordingly; And the Court did declare that the plaintiff *George Heneage Walker Heneage* was entitled to an estate for life in such parts of the real estates of the said testator *John Walker Heneage* as were unsold and undisposed of by the testatrix *Arabella Walker Heneage* in her lifetime, as were devised to him by the said will and codicils of the testatrix, subject to the term of five hundred years, vested in the Defendants *Robert Nicholas* and *Edward Goddard*, with such limitations over as are contained in the said will and codicils of the said testatrix; and that the Plaintiff *George Heneage Walker Heneage* was also entitled in like manner to all the real estates of the said testatrix of which she was seised at the several times of making her will and codicils, and of her death, and which were devised to him by the



the said will and codicils, subject to and with such limitations over as aforesaid.

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v.

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That the said bill should be dismissed out of the Court as against the Defendants Baron *Whitworth* and *Arabella Diana* Duchess of *Dorset* his wife, *George Gordon* Earl of *Aboyne* and *Catherine* Countess of *Aboyne* his wife, and *John Calcraft* and *Henrietta Arabella Meredith*, with costs, to be taxed, for the said Defendants.


Decree,  
22d May, 1822.

That such costs, when taxed, should be paid by the Defendants the Earl of *Suffolk*, *Robert Nicholas*, and *Edward Goddard*, and be allowed to them in passing their accounts thereafter directed.

But the Court reserved the consideration of the question out of what fund such costs should ultimately be paid, until after the said Master should have made his further report as thereafter directed.

And it was further ordered and decreed by the Court, that it should be, and it was thereby referred to the said Master to take an account of the rents and profits of the said devised estates, accrued due since the death of the said testatrix *Arabella Walker Heneage*, and which had come to the hands of the Earl of *Suffolk*, *Robert Nicholas*, and *Edward Goddard*, or any or either of them, or to the hands of any other person or persons, by their, or any or either of their order, or for their, or any or either of their use; and it was further ordered

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 and others.

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ordered by the Court, that in taking such accounts, the said Master was to distinguish how much and what parts of such rents and profits accrued and became due during the minority of the said *George Heneage Walker Heneage*; and it was further ordered and decreed by the Court, that the said Master should also take an account of all timber and timber trees which had been felled and cut down on the said devised estates by or by the order of the said Earl of *Suffolk*, *Robert Nicholas*, and *Edward Goddard*, since the death of the said testatrix, and whether the same or any of them had been sold, and for how much, and how and in what manner the monies arising by such sale or sales, if any, had been applied and disposed of.

And it was further ordered and decreed by the Court, that the said Master should inquire whether there were then or at the time of the death of the said testatrix, any and what debts of the said testator *John Walker Heneage* remaining unsatisfied, and to whom due, and on what securities, and whether any of such debts had been since paid, and by whom; and if the said Master should find that there were any such debts then due, then he was to calculate interest thereon after the rate of interest they respectively carried.

And it was further ordered and decreed by the Court, that the said Master should also take an account of the personal estate and effects of the said testator *John Walker Heneage* possessed or received  
by

by the said testatrix *Arabella Walker Heneage* in her lifetime, or by any person or persons by her order or for her use, and of her application thereof; and that he should also take an account of the personal estate and effects of the said testatrix *Arabella Walker Heneage*, not specifically bequeathed by her, come to the hands of the said Earl of *Suffolk*, *Robert Nicholas*, and *Edward Goddard*, or any or either of them, or to the hands of any other person or persons, by their, or any or either of their order, or for their, or any or either of their use.—That the Master should also take an account of the testatrix's debts, funeral and testamentary expenses, and of the legacies and annuities given by her said will and codicils, and should compute interest on such of her debts as carried interest after the rate of interest they respectively carried, and on the legacies from the end of one year after the said testatrix's death, after the rate of 4*l. per cent. per annum*, unless any other time of payment or rate of interest was limited by her said will or codicils, and in that case according to the said will or codicils. That he should cause advertisements to be published in the *London Gazette*, and such other public papers as he should think fit, for the creditors of the said testator and testatrix respectively to come in before him and prove their debts, and he was to fix a peremptory day for that purpose, and in default of their coming in to prove their debts by the time so to be limited, they were to be excluded the benefit of the said decree. That an inventory be made of the several articles of furniture, jewels, and effects, specifically bequeathed


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ANDOVER  
and others.Decree,  
22d May, 1822.

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ANDOVER  
and others.Decree,  
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bequeathed by the said testatrix as heir-looms, and that one part of such inventory should be signed by the said respondent *George Heneage Walker Heneage*, and should be deposited with the said Master. That he should inquire and certify whether any and what sum or sums of money had been allowed or paid to or for the maintenance and education of the said *George Heneage Walker Heneage* during his minority, and if he should find that no such allowance had been made, that he should state what sum ought to be allowed for such maintenance. To be at liberty to state any special circumstances relating to any of the matters thereby referred to him, and that in taking the said accounts, he was to make to all parties all just allowances. That he should tax all parties their costs of the said suit, but the Court reserved the consideration of the payment of such costs and of all further directions until after the said Master should have made his report, and any of the parties were to be at liberty to apply to the Court as they should be advised. And he was to be at liberty to make a separate report or reports as to any of the matters thereby referred to him as he should think fit.

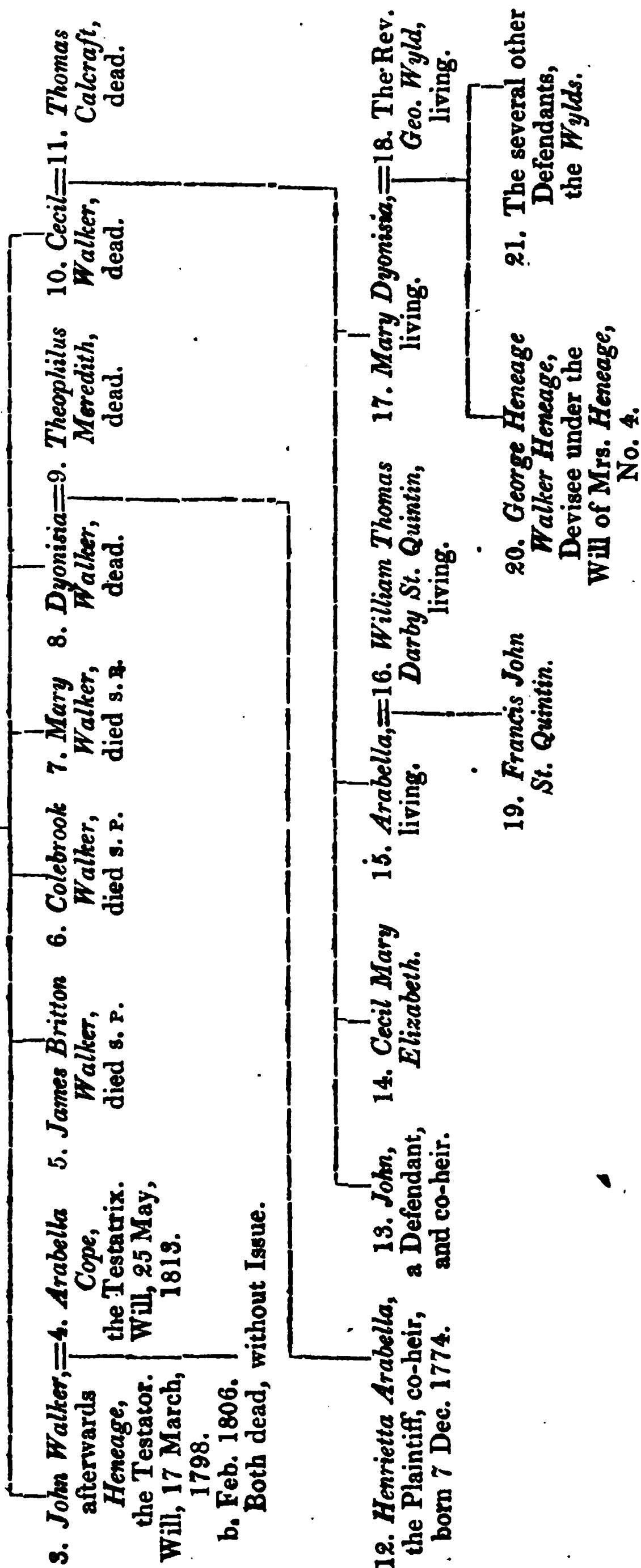
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[See the next case of *Meredith v. Heneage*.]

1822.

The following is the PEDIGREE referred to in the preceding case:

1. *John Walker* = 2. *Dionysia Colebrook*.



IN THE HOUSE OF LORDS.

Appeal from the Decree of the Court of Exchequer.

HENRIETTA ARABELLA MEREDITH and JOHN CAL-  
CRAFT . . . . . Appellants,  
AND  
GEORGE HENEAGE WALKER HENEAGE and others,  
Respondents.

1824.

22d June.

A recommenda-  
tion or desire  
expressed in a  
will, that the  
devisee to whom  
the will declares  
the testator  
“ has devised  
and bequeathed  
the whole of his  
real and per-  
sonal estate,  
unfettered and  
unlimited, in  
full confidence,  
with the firmest  
persuasion”  
that she will  
adopt it, i. e.  
in the words of  
the will, “ that

THE Appellants, two of the Defendants in the foregoing suit, appealed against so much of the decree in the preceding case as declared that the Respondent, *G. H. W. Heneage*, was entitled to an estate for life in such parts of the real estate of the said testator, *John Walker Heneage*, as were unsold and undisposed of by the said testatrix, *Arabella Walker Heneage*, in her lifetime, devised to him by the said will and codicils of the said testatrix, subject to the said term of five hundred years,

in her future disposition and distribution thereof she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference,” is not confined strictly to the heirs at law of the original testator, but may be applied to any or either of all his direct descendants.

Thus, in such a case the second testator may devise to a son of a younger daughter of the youngest sister of the first devisor, in preference to the daughter of an elder sister, and to the only son of the same youngest sister of the first testator.

It is not the true construction of the terms of such a devise, accompanied with such a trust, that the estate should be given entire and altogether to any one of the first testator's heirs or descendants.

Notwithstanding therefore the terms of the will expressing confidence that the testator's devisee would devise the whole of his devised estate together and entire,—Held, that the testatrix was not bound thereby to make such entire disposition of the whole.

years, vested in the said Respondents, *Robert Nicholas* and *Edward Goddard*, with such limitations over as are contained in the said will of the said testatrix, and as thereupon ordered (&c.) that the said bill should stand dismissed out of the Court against the said Appellants, with costs to be taxed for them; and all other the orders and directions contained in the said decree, upon further directions, touching such parts of the real estate of the said testator, *John Walker Heneage*, as aforesaid, consequent upon the aforesaid declaration of the said Court, that the said Plaintiff, *George Heneage Walker Heneage*, was entitled to an estate for life in the same, subject as aforesaid, the Appellants insisting that the devises and bequests contained in the will of the testatrix, *Arabella Walker Heneage*, of the real and personal estates of the testator, *John Walker Heneage*, were void, except so far as regards the provision thereby made for *Arabella Ann Caroline Jenny Pigott*, so long as she should remain sole and unmarried; and that the Appellants as heirs at law, as well of *John Walker*, the father of the testator *John Walker Heneage*, as of the testator *John Walker Heneage*, were entitled to the said real and personal estates of the testator *John Walker Heneage*, subject to the provision so made by the said will of the testatrix *Arabella Walker Heneage*, for *Arabella Ann Caroline Jenny Pigott* as aforesaid, for the following amongst other reasons:—

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~  
 MEREDITH  
 and another  
 v.

HENEAGE  
 and others.

1st. Because

his said wife, the said testatrix, *Arabella Walker Heneage*, (after making a suitable provision out of his real estate for the said *Arabella Ann Caroline Jenny Pigott*, for her life, in manner mentioned in the said will,) to devise and bequeath the whole of his real and personal estate, together and entire, to one of the heirs of his late father *John Walker*, giving her power only to select such one of the heirs of the said testator's father as she might think best deserved her preference; and because the property which was the subject of the trust was certain, videlicet, the real and per-

and the life of the longest liver; and their respective receipt or receipts only, or the receipt of such survivor, to be to the said trustees, or the survivor of them, his executors or administrators, a sufficient discharge; and from and after the several deceases of the said *Jenny Pigott* and *Arabella Ann Caroline Jenny Pigott*, and the survivor of them, then she directed that the said trustees, and the survivor of them, and the executors and administrators of such survivor, should stand and be possessed of and interested in her said residuary personal estate, or the produce thereof, and all and every the stocks, funds, and securities, wherein or upon which the same should be placed, or continued in trust for, and for the benefit of the said *Jonathan Cope*, clerk, and all and every the children of the said testatrix's sister, *Ann*

*Bolleville*, by her late husband, *Toby Wade Caulfield*, deceased, to be equally divided between them in equal proportions, share and share alike. And the said testatrix directed that the respective shares of the said children of the said *Ann Bolleville* should be considered as vested interests in them respectively, when they should respectively attain the age of 21 years, with benefit of survivorship, and such provision for maintenance and education during minority as therein mentioned; and in case all the children of the said *Ann Bolleville*, by the said *Toby Wade Caulfield*, should die before they attained 21, then the testatrix directed that the whole of her residuary personal estate should be held in trust for the said *Jonathan Cope*, clerk, his executors, administrators, and assigns.

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1824.

MEERDITH  
and another  
v.

HENEAGE  
and others.

Appellants'  
Reasons.



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MEREDITH  
and another  
v.

HENRAGE  
and others.

Appellants'  
Reasons.

sonal estate of the testator together and entire, subject to such income out of the testator's real estate as his said wife should secure to the said *Arabella Ann Caroline Jenny Pigott* for her life, in the manner mentioned in his said will. And because the persons in whose favour the trust was imposed were certain, videlicet, the heirs of the said testator's father, *John Walker*, to one of whom the said testator's wife (after making a suitable provision out of the testator's real estate for the said *Arabella Ann Caroline Jenny Pigott* for her life, as aforesaid,) was to devise and bequeath the said testator's real and personal estate together and entire. It is to be observed, that at the time the said testator made his said will he had two sisters living, who, in case of his death, would be the heirs of his said father; and both of whom having issue living at the time, the probability was, that the said testator's wife would have a power of selection amongst the heirs of the said testator's father, and which in fact happened, there having been two heirs of the said testator's father living as well at the respective times of the said testator's making his will (setting himself out of the question) and of his death, as at the respective times of the said testatrix making her said will and codicils, and of her death.

2dly. Because the word *heirs*, in the clause in question in the said testator's will, must be construed in its plain and usual acceptation, as meaning the very heirs of the said testator's said father at the time of the said testatrix making her selection

tion and death, that being the meaning of the word *heirs* whenever it is used as a designation of the person or persons to take, and there being nothing in this case to call for a departure from such meaning of the word: and because the meaning which the said Respondents, the Plaintiffs in the said cause, put upon it, videlicet, all the heirs of the said testator's father present and to come, proximate and remote, so as to admit of the said testatrix selecting any descendant of the said testator's father, though not one of the very heirs, to whom to give his real and personal estate, is strained, unnatural, and unwarranted by any decided case.

3dly. Because, supposing the power given by the said testator to the said testatrix to have enabled her to devise and bequeath his real and personal estate to any descendant of the said testator's said father, though not one of the very heirs, yet she has not well executed the power, inasmuch as she has not (after making provision for the said *Arabella Ann Caroline Jenny Pigott* for her life, as next in the case,) given the said testator's real and personal estate together and entire to one of such descendants whom she might think best deserved her preference, but has given certain articles of the said testator's personal estate which remained in her hands in specie to persons entirely strangers in blood to the said testator's said father, and (after making provision for the said *Arabella Ann Caroline Jenny Pigott* for her life, as mentioned in the case, has devised  
the

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~  
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the said testator's general real estate to divers of the descendants of the said testator's said father for limited estates and interests in succession in strict settlement, and has made certain provisions out of such real estate for persons entirely strangers in blood to the said testator's said father, and for purposes not authorized by the said testator's will, besides having sold and disposed of certain parts of such real estate in her lifetime.

Case of  
 Respondents.

On the part of the Respondents, *George Heneage Walker Heneage, Thomas J. Wyld, William Thomas Wyld, John Wyld, Mary Cecil Wyld, Arabella Eliz. Wyld, Caroline Patience Wyld, Cecil Cath. Wyld, Eliz. Milward Wyld, Francis John St. Quintin, Arabella Bridget St. Quintin, George Wyld and Mary Dionysia* his wife, it was insisted that the decree ought to be affirmed, "because the Appellants had not any right to or interest in the estates of the said testator, *John Walker Heneage*, in any view or construction of the testator's will:" that the Appellants, therefore, were not parties aggrieved by the decree, and were consequently not entitled to any appeal.

For the Respondents, *Edward Warren Caulfield, Arabella Ann Caroline Jenny Pigott, and Edward Goddard*, the committee of her estate, it was contended that the said decree, by declaring that the trusts of the will and codicils of the said testatrix, *Arabella Walker Heneage*, ought to be carried into execution, and by decreeing the same accordingly, and by declaring the right of the Respondent  
*George*

*George Walker Heneage* to the real estates of the said testator, devised to him by the will and codicils of the said testatrix, to be subject to the term of 500 years created by her will, assumed that the said testatrix took an absolute and unfettered estate and interest for her own benefit in the real and personal estate of the said testator, as the Respondents *Arabella Ann Caroline Jenny Pigott* and *Edward Warren Caulfield* understand such decree. And upon the understanding that the effect of such decree is as hereinbefore stated, the Respondents, the said *Arabella Ann Caroline Jenny Pigott* and *Edward Warren Caulfield*, hope that so much of the said decree as is appealed from will be affirmed, for the following amongst other reasons:—

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MEREDITH  
and another  
v.

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and others.

Because the said *Arabella Walker Heneage* was, under the will of the testator *John Walker Heneage*, not merely tenant for life, but absolutely entitled to all his real and personal estate, or had an absolute right and power to dispose thereof unfettered and unlimited, subject only to the payment of his debts and the two annuities of 100*l.* each given by the codicil to his will; and that the confidence reposed in her by the said will did not, according to the terms and true effect and meaning thereof, create a trust; and therefore that the said *Arabella Walker Heneage* had full power to devise and bequeath the said real and personal estates in manner by her will and codicils expressed; and the same are thereby, as the Respondent

Reasons in support of their construction of the will and propriety of the decree as to them.

1824.

MERRITT  
and anotherv.  
HENEAGE  
and others.Respondents'  
Reasons.

spondents humbly submit, well devised and bequeathed or disposed of.

On behalf of the Respondent *Jenny Pigott* it was submitted that the decree should be affirmed on nearly the same grounds, stating them in nearly the same terms, adding, "as the said *Jenny Pigott* understands such decree, although she submits that it would preclude all question if such decree were to declare what estate and interest the said testatrix did in fact take under the will of the said testator, and what estates and interests passed under the will and codicils of the said testatrix in the real and personal estate of the said testator to the Respondent *Jenny Pigott*, and the other parties claiming under such will and codicils; but upon the understanding that the effect of such decree is as hereinbefore stated, and subject only to such variation as may be necessary to obviate the ambiguity of the said decree in the particulars above mentioned, Respondent hopes so much of the said decree as is appealed from will be affirmed.

Because the intention of the testator, *John Walker Heneage*, from the whole scope and object of his will, is manifest to be, and the effect thereof is to give to the testatrix, *Arabella Walker Heneage*, a fee-simple in all his real estate, and an absolute interest in all his personal estate, respectively comprised in such will, unfettered by any trust, and unlimited in estate or interest, and subject only

only &c., and therefore all &c. became the absolute property of said testatrix, and as such was well devised &c.

1824.  
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 MEREDITH
 and another
 v.
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 and others.
 Respondnts'
 Reasons.

The case was argued on the part of the Appellants, by *Fonblanque*.

For the Respondents, *George Walker Heneage* and the other persons in the same interest, the decree was supported by *Wetherell, Roupell, and Preston*:—for the Respondents, *Edward Warren Caulfield*, and the others in the same interest, by *Horne and Lynch*;—and by *Wray and Coote*, for the Respondent *Jenny Pigott*.

The reasons appended to the different cases of the various parties were supported by the several Counsel on much the same grounds and authorities as are already succinctly stated in the report of the cause, as determined in the Exchequer.

The result was, that the House, giving judgment, declared the

Petition dismissed, and the
 Decree affirmed.

IN THE EXCHEQUER CHAMBER (IN EQUITY).

1827.

23d June.

Coram,
Alexander, Lord
Chief Baron.

Construction of
Will.

Charges imposed by will, creating a term upon real estate, to be paid out of the rents and profits, are *primâ facie* to be paid out of the *annual* rents and profits. Such is the *primâ facie* meaning of the words,

The same words may mean that the charges shall be satisfied by sale or mortgage of, or of part of the estate, as where it would be necessary to give effect to the charge on the property, according to the intention of the testator, and where the tenant for life is also remainder-man in fee,

Where it is a question of construction of the meaning of the will, to be determined by intention of the testator, recourse must be had to the general tenor of the whole will,

HENEAGE and another v. Lord ANDOVER and others.

THE House of Lords having, by their determination of the appeal in this case, affirmed the decision of the Court of Exchequer, the cause was of course remitted to that Court in the usual manner, for further directions, and the ultimate disposal of the matters in question between the various parties to the suit.

In *May*, 1827, the Master made his report, as required by the decree of the 23d *May*, 1822 (a).

Exceptions were taken to that report, and by an order made 27th *June*, 1727, it was ordered that the report should be confirmed.

It was by that order referred back to the Master, to compute what part of the debts of the testator *John Walker Heneage*, and of the testatrix *Arabella Walker Heneage*, were then due, and which were specified in the said report as composed of interest which had accrued due, during the time the Plaintiff, *George Heneage Walker Heneage*, had been entitled to the rents and profits of the estates in question: and the

(a) *Vide ante*, p. 300.


Court

Court declared, that such part of the interest which had so accrued ought to be paid out of the fund in Court, arising from rents and profits; and that the surplus of the said debt, including the sum of 150*l.* and interest due to *William Chivers*, and secured by the promissory note of the testatrix, dated the 8th *February*, 1814, not exceeding the sum of 8,000*l.*, ought to be paid out of the same fund: and, without prejudice to the said inquiry, it was ordered and decreed by the Court that the Accountant-General should sell the sum of 12,154*l.* 7*s.* 5*d.* Bank 3 per cent. Reduced Annuities, standing in his name, to the credit of this cause, to an account intituled "the Real Estates," which had arisen from such rents and profits; and it was further ordered that out of the monies which should arise by such sale, the said Accountant-General should pay to the several persons named in the third schedule to the report, and also to the said *William Chivers*, the several sums so reported due to them respectively; and should pay the balance of the money to be produced by the said sale, to the Plaintiff, *George Heneage Walker Heneage*, he undertaking to pay thereout the subsequent interest on the said debts.

The Plaintiff petitioned for a rehearing of the cause as that order, praying that so much of the order as above should be varied on the following amongst other grounds; *viz. that the charges of 500*l.* and 700*l.*, and the amount of the debts not exceeding 8,000*l.* (a), due from the*

(a) *Vide ante*, p. 235, *et seq.*

1827.


 HENEAGE
 and another
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 and others.

testator *John Walker Heneage*, and the testatrix *Arabella Walker Heneage*, ought to be raised BY SALE OR MORTGAGE of a sufficient part of the estates in the pleadings mentioned, and that the INTEREST ONLY on those debts ought to be paid out of the rents and profits of those estates, accrued due since the death of the said testatrix; or if the Court should not be of that opinion, then that the whole of the rents and profits accrued due during the minority of the Plaintiff, *G. W. H. Heneage*, ought to be applied, as far as the same would extend, in payment of such debts, and the interest thereon, and not as provided by the decree, that the interest only on those debts, during that period, should be paid out of such rents and profits.

In support of the petition for a rehearing, *Treslove and Roupell*, on the part of the Plaintiff, *G. W. Heneage*, contended that the charges upon the real estates, created by the term of 500 years, ought to be discharged by raising a sufficient sum by sale, or upon the security of an adequate portion of those estates, and not by and out of the annual rents and profits of the same estates.

They submitted that the Courts had always held, that the words "rents, issues, and profits," when applied to the means of discharging charges upon real property, were sufficient to authorize a sale or mortgage of the estates themselves, for the purpose of paying off the incumbrances so charged upon them, as determined by a long list of authorities in the following adjudged cases:

Lingen

Lingen v. Foley(a), *Warburton v. Warburton*(b),
Backhouse v. Middleton(c), *Trafford v. Ashton*(d),
Countess of Shrewsbury v. Earl of Shrewsbury(e),
Ivy v. Gilbert(f), *Evelyn v. Evelyn*(g), *Green v.*
Belchier(h), *Allan v. Backhouse*(i).

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They urged, that in this case it would be a great hardship to compel payment of those charges out of the interest given to the tenant for life, and that as that hardship was the very consideration that first gave rise to the doctrine of so applying the words "rents and profits," as to affect the estate itself, this was a fit and proper case for a similar application of the same words, in relief of the tenant for life, by placing the burthen where it would be most easily and equably borne.

Skirrow, Wray, and Tennant, on the contrary, insisted, on behalf of various parties interested in opposing this view of the case, that there was no pretence for so extending the effect and operation of the words "rents and profits," in the present case, beyond their common and ordinary sense, or that in which they were obviously used and applied by the testatrix in this will; and they urged, that the question had always been one of intention, to be collected from the words themselves, with

(a) 2 Ch. Ca. 205.

(b) 2 Vern. 420.

(c) Ca. in Ch. 176.

(d) 1 P. Wms. 415.

(e) 1 Ves. 234; 3 Bro. Ch. Ca. 121.

(f) 2 P. Wms. 13; Prec. in

Ch. 583; 2 Bro. Parl. Ca. 468.

(g) 2 P. Wms. 659.

(h) 1 Atk. 505.

(i) 2 Ves. & Bea. 65.

reference

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reference certainly, on some occasions, to the general tenor and scope of the will; that in this case there was nothing in the will to rebut the ordinary use of the words as meaning annual rents and profits, or to require the application of the doctrine now contended for.

In *Heycock v. Heycock*(a), and *Talbott v. Duke of Shrewsbury*(b), they submitted, the reason of the course of equity in directing sales of estates, or part, to satisfy charges, was said to be insufficiency of the rents and profits to pay the charges *within a reasonable time*.

In the cases cited on the other side, they observed, it had been a construction made necessary by the state of things in each instance, in order to do justice to the parties entitled to the benefit of charge.

In *Small v. Wing*(c), *Okeden v. Okeden*(d), *Mills v. Banks*(e), *Warter v. Hutchinson*(f), it was recognized as the fixed doctrine of Courts of Equity, that the word “profits,” as used in creating trusts of terms for raising money, must be taken to mean annual profits only, excluding mortgage or sale, and that it has only been extended to the corpus of the estate where the intention of the testator was obvious, and the nature of the charge required and necessarily implied it, *Mills v.*

(a) 1 Vern. 256.

(b) Prec. in Ch. 394.

(c) Bro. Parl. Ca. 74.

(d) 1 Atk. 550.

(e) 3 P. Wms. 8.

(f) 1 Sim. & Stu. 276.

Banks;

Banks; that directing a gross sum to be raised, does not imply that it is to be raised at once, *Okeden v. Okeden*; and here the intention was manifestly against such a constructive implication, and intention must always govern the Court, *Warter v. Hutchinson*.


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ALEXANDER, *Chief Baron*, (after stating the facts).—It appears to me that the argument in this case really amounts to no more than this: It is urged, that although the 8,000*l.* is directed to be paid out of the rents and profits of the several premises comprised in the term of 500 years, yet that this direction does not mean out of the annual rents and profits, but out of the corpus of the estate; and many cases have been cited, whereby it is said to have been decided, that such a devise must be construed to be a direction that the charges should be satisfied by money to be raised by sale or mortgage of the estates.

Upon looking into those cases, they do not appear to me to decide any such thing.

In the present case, the question is simply whether the testatrix did or did not intend this to be a charge upon the rents and profits given to the tenant for life, or first taker of the property. In the cases which have been relied on, as showing that the words "rents and profits" in devises of this description, do not necessarily mean annual rents and profits—and they are the earlier cases upon this question—the devisees were either tenants in fee, or tenants in tail with a power

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power of converting the estate into a fee, where the remainder-man had to bear the charge in the end, either sooner or later. They only respected the time at which those who were entitled should be paid ; but where, as in this case, the matter lies between the remainderman and tenant for life, the doctrine of those cases cannot be applied to determine whether these words are sufficient to put it upon the latter to pay the interest of the charge only, or whether he must not also pay the principal.

This is strictly a question of intention, to be collected from the general tenor of the will, with reference to the different provisions contained in it. There can be no doubt, generally speaking, that where there is nothing in the will repugnant to such a construction of those words, rents and profits mean annual rents and profits, and that is conceded in all the cases upon the subject.


There are cases where the remainder-man under a will takes an estate of inheritance, subject to a charge, unless there be something demonstrating a contrary intention in the testator, which warrant the Court, in favour of the person entitled to the charge, if it be a gross sum, to raise it by sale or mortgage. The controversy becomes most important where it arises between the remainder-man in fee and the tenant for life only. It is then a question, very materially affecting the interest of the devisees, whether the corpus of the estate is to bear the charge, or the first devisee is to lose all benefit of his estate until the charge is satisfied.

I have

I have already said that I can only treat this as a question of intention: and in this it seems clear that the words “rents and profits” must be taken in their *primâ facie* sense to mean *annual* rents and profits. If any inference arises from the dispositions in the will, to show that the devisor so intended, there would be a very strong inclination, on the part of the Court, to construe these words as they have often been construed, so as to prevent the tenant for life from entirely losing the benefit of the devise in his favour; but, however much I may regret it, I cannot help thinking, that in the present devise, the intention is manifest to make the gross sums of 500*l.*, 700*l.*, and 8,000*l.* charges upon the annual rents and profits. The reasons upon which I come to that conclusion, are these: First, the testatrix uses the words “rents and profits” in their ordinary sense, as words which *primâ facie* mean annual rents and profits. 2d. The gross sums are directed to be paid in the same terms as the annuities; and therefore, if the argument on the part of the Plaintiff were correct, the testatrix must have used the same words to express different intentions—meaning annual rents, when she directs the annuities to be paid out of the rents and profits; and meaning a charge upon the corpus of the estate when she directs the gross sums to be raised out of such rents and profits. And 3dly. Some of the gross sums, as Mr. *Heneage*’s, her husband’s, debts and her own, by mortgage, were already charges on the estate.

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Now it is a very extraordinary and idle devise to provide for mortgage debts by a charge upon the body of the estate to the extent of 8,000*l.*, when they were already and independently of her will, to the whole amount, a charge upon the corpus of the estate; whereas, if it be supposed that the testatrix meant to ease the inheritance at the expense of the first taker, then the whole is natural and consistent, and this supposition is the more probable, as all the devisees for life were at that time infants of tender age. The same observation applies to the interest due on the mortgages; it is absurd, if it be considered that the proportion of the 8,000*l.* to be applied in payment of the mortgage, is to be only a charge by means of which the tenant for life was to keep down the interest only. That would, in effect, be doing nothing; but it is a material and effective provision, if the testatrix intended, by a dedication of the rents for some time after her decease, to relieve the burthen which she found upon the inheritance.

The manner in which the testatrix disposes of the rents and profits, after the trusts of the term shall have been satisfied, affords also conclusive evidence, that she meant those trusts to be provided for by annual rents and profits. Her devise to the tenant for life of the residue and overplus of the rents and profits, after the charges are satisfied, is a manifest declaration that the charges were to be satisfied out of the same rents and profits of which the residue is given. The next provision, disposing of the surplus rents,

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and profits, meaning by sale or mortgage, and then when this shall be done, provide that the surplus rents and profits shall be laid out in land, and settled to the same uses?

In short, almost every paragraph of this part of the will convinces me, that when the testator directed the charges in gross to be levied and raised out of the rents and profits of this estate, she meant *annual* rents and profits, and had an absolute intention that no devisee of the freehold should receive any thing until those charges were satisfied. Although, therefore, other observations might be made, raising arguments to the same purpose, I do not think it necessary to add any thing more in support of my opinion that I must dismiss this petition.

Petition dismissed.

ORDS.

Exchequer.

, &c. v. FORE-
of WRIGHT, a

1822.

*Tithes :—
Moduses and
Pleading.*

a bill in the
Michaelmas

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ed or shown.

Moduses plead-
ed as in the
answer set
forth in the
statement of
the pleadings in
this case:—

Held, not to be
ill pleaded; but
to be well and
sufficiently laid
as a defence to
a bill for tithes,
where it had
been objected
at the bar by
the Counsel for
the Plaintiff,
1st. That the
moduses, as
there pleaded,
were badly and
insufficiently
laid, having left
it wholly in
doubt, and un-
certain to what
lands, or to what
portion of the
lands, they
were meant to
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evidence.

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and others.

seeds, eggs, apples, pears, plums, and other fruit, potatoes, turnips, cabbages, and other roots and garden-stuff, cyder, honey and wax, and, generally, tithes of divers other matters and things.

Charges of the
Bill.

The bill charged, that such tithes had always been due and payable to the vicar of the said parish for the time being, and that if any sum or sums of money had at any time been paid to the vicar of the said parish for the time being, the same had been paid as a temporary composition or compositions only, and not as a modus or moduses; and that such payments commenced within the time of legal memory, and had frequently varied in amount. And further charged, that notices had been delivered to each of the Defendants to the said original bill to set forth to the Plaintiff *Wright* from *Easter* 1812, the aforesaid tithes.

Prayer of Bill.

The bill prayed an account of the single value of the tithes of all the titheable matters and things aforesaid, which such of the Appellants as were Defendants to the original bill, together with *Beadon*, deceased, had respectively since the festival of *Easter* 1812, had, or taken upon or off their said farms and lands, and that they should be decreed to pay to the said *Henry Cornelius Wright* what should appear to be coming to him from them respectively on the taking such account, the Plaintiff thereby waiving all pains and penalties which might have been incurred by such of these Appellants as were Defendants to

to the original bill, and said *Beadon*, deceased, respectively, for subtracting, or not setting out their said tithes, or any of them, and for general relief.

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Such of the Appellants as were Defendants to the said original bill, together with the said *Richard Beadon*, deceased, by their joint and several answer filed in *Trinity* term, 1814, to the bill of complaint, admitted the Rev. *Michael Dickson*, clerk, to be vicar, and that he, or his lessee or lessees, had been, and then was or were entitled to all the small and vicarial tithes respectively arising, growing, renewing, and increasing, within the said vicarage or parish, or the titheable places thereof, or the moduses or customary payments in respect thereof, and, among others, of all the titheable matters and things in the said bill of complaint mentioned, except such of them in respect of which the moduses or customary payments respectively, in lieu thereof, were to be rendered or payable as thereafter mentioned.

Answer filed
Trinity term.
1814.

The answer further admitted the demise to the Plaintiff *Wright*, and submitted his right to the Court under such demise, as to the said tithes and moduses or customary payments, in respect of them or any of them; and admitted, that they had, since the festival of *Easter*, 1812, respectively holden and occupied, and did then respectively hold and occupy divers parcels of lands and other tenements, within the said parish of

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of *Pitminster*, or the titheable places thereof, the quantity and particulars whereof they set forth in the schedule to their answer annexed; and they also admitted, that such of them as were in the said schedule mentioned, had respectively, since *Easter*, 1812, taken from off the said respective lands, or certain parts thereof, the several titheable matters in the bill mentioned; and they set forth in the schedule to their answer, a list or schedule of such of the said several matters and things so produced on their respective farms and lands since the time aforesaid, and down to the festival of *Easter* 1814, by each of them respectively, as had not been rendered and satisfied to the said *Henry Cornelius Wright*, or his agents, together with the sums of money for which the calves, apples and fruit therein mentioned were sold, as to such parts thereof as were by them so sold and disposed of, and of the profits thereby produced.

Claim of
moduses.

Such of the Appellants as were Defendants to the original bill, and *Richard Beadon*, deceased, by their answer claimed the following moduses:—that there were payable at *Easter*, in each year, or as soon after as demanded, to the vicar, his lessee or farmer, since the endowment or creation of the said vicarage, and to the rector or other person entitled thereto, before the endowment or creation thereof, by each and every occupier of houses, gardens, farms and lands, within and throughout the said parish, or the titheable places thereof, (except the occupiers of
the

the lands there, called the glebe-lands, a certain farm and lands called *Higher Poundisford*, or the *Barton of Higher Poundisford*, and a certain other farm and lands called the *Lower Poundisford*, or the *Barton of Lower Poundisford*; certain other lands called the *Barton of Barton*; certain lands called *Poundisford Parks*, and the warren or conigree for and'in respect of the same farms and lands, and of which the respective farms and lands of the said Defendants to the said original bill formed no part,) for each and every acre of meadow ground and other grass land within the said parish, or the titheable places thereof, mown for hay (except as before excepted,) the yearly sum of two-pence, and so on in proportion, for any greater or less quantity of meadow land, and other grass land, than an acre; for every milch cow, the yearly sum of two-pence, for and in lieu and full satisfaction of the tithe of milk of every such cow; for every calf fallen or dropped within the said parish, or the titheable places thereof, and bred up for the plough or pail, a half-penny, for and in lieu and full satisfaction of the tithes of all such calves respectively; for every calf fallen or dropped within the said parish, or the titheable places thereof, and afterwards sold, one penny in every shilling of the money for which every such calf was sold, for and in lieu and full satisfaction of the tithe of every such calf; for every hogshead of cyder, made by each and every occupier of lands within the said parish, or the titheable places thereof, (except as before excepted), from

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 and others  
 vs  
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 and another.

Twopence an  
 acre for land  
 mown for hay.

Twopence per  
 cow for milk.

Half-penny for  
 every calf bred  
 up for plough or  
 pail.

One penny in  
 every shilling  
 for every calf  
 sold.

Twopence per  
 hogshead of cy-  
 der for apples  
 made into such  
 cyder.

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**SOUTHWOOD**  
and others  
v.

**FOREMAN**  
and another.

One penny in  
every shilling  
for apples and  
pears sold.

One penny for  
garden.

Left shoulder of  
every calf killed  
for occupier's  
consumption.

apples grown on his lands, within the said parish or the titheable places thereof, the sum of two-pence, and so on in proportion for any less quantity of cyder than an hogshead, for and in lieu and full satisfaction of the tithe of all such apples so made by them into cyder. For all apples and pears grown in each year on his lands within the said parish, or the titheable places thereof, (except as before excepted,) and sold, the sum of one penny in every shilling of the money for which such apples and pears were sold, and so in proportion for any less quantity of apples and pears, for and in lieu and full satisfaction of the tithes of such apples and pears so sold; and for every garden within the said parish, or the titheable places thereof, (except as before excepted,) the sum of one penny for and in lieu of and full satisfaction for the tithes of all garden stuff, yearly arising, growing, and renewing, or increasing, in and upon and had and taken from each and every such garden: all which moduses, or customary payments, the answer stated, had, during all the time aforesaid, been and then were due and payable at *Easter* in each year, or as soon afterwards as demanded; and a modus for each and every occupier of lands within the said parish, (except as before excepted,) to deliver to the vicar, or such other person as aforesaid, the left shoulder of every calf fallen on his lands within the said parish, or the titheable places thereof, and killed in the said parish, for the use and consumption of such occupier, and no part sold; for the tithe of every calf so killed and

delivered as soon as conveniently might be after the killing of every such calf: and a modus for each and every owner of any sheep within the said parish, or the titheable places thereof, and shorn there, and depastured within the said parish, or the titheable places thereof, (except as before excepted,) for all sheep so depastured and shorn, at the option of the vicar, his lessee or farmer, or the said rector, or other persons as aforesaid, to deliver to such vicar, lessee, farmer, or rector, either the tenth fleece, or the tenth pound of wool of all the wool shorn off the said sheep, immediately after the shearing thereof, in case the wool so shorn had amounted in one year to ten fleeces, or ten pounds weight; but in case the same had amounted to less than ten pounds weight, nothing had been payable for or in lieu of tithe for a lesser quantity; and which customary payments last mentioned, the said answer stated had been payable during all the time aforesaid, for and in full satisfaction of the tithe of wool so shorn, and a modus for the owners of all lambs found on any lands or tenements within the said parish, or the titheable places thereof, (except as before excepted,) to deliver to the vicar or his lessee or farmer, or such rector as aforesaid respectively, on Mark's day, in lieu of the tithes of such lambs, if such number of lambs then found there had been seven, and under the number of ten, one lamb of such seven, or such other number above seven, and under ten, and so in proportion for any greater number, for and in satisfaction of all

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Tenth fleece or tenth pound of wool, if wool shorn amounts to ten fleeces, or ten pound weight; if less than ten pounds weight nothing

One lamb for every seven and under ten four



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and another.

One halfpenny  
for every lamb  
sold before  
Mark's day.

TITHES OF SUCH LAMBS SO TOUND ON MARK'S DAY, and in case the owners of any lambs fallen or produced within the said parish, or the titheable places thereof, (except as before excepted,) had sold any one or more of such lambs before Mark's day, one halfpenny had been during all the time aforesaid payable and paid to the said vicar for the time being, his lessee or farmer, or to the said rector or other person entitled to tithes as aforesaid, for every such lamb sold for and in lieu of the tithe of such last-mentioned lambs sold by such owners respectively.

Tender of moduses or customary payments.

The answer stated a tender at *Easter*, 1813, and in 1814, of the said several moduses or customary payments payable at *Easter*, and that the Defendants had always been ready to pay and render to the said *Henry Cornelius Wright*, since *Easter*, 1812, such customary payments, or moduses, as had been payable by them, and that the Appellant, *William Kinglake*, had always been ready, and that such of the Appellants as were Defendants to the said original bill, and the said *Richard Beadon*, deceased, were ready to pay to the said *Henry Cornelius Wright*, or his agents, such moduses, or customary payments due and payable from them since the time last mentioned, and that they in fact paid to the agents of the said *Henry Cornelius Wright* the tithes of the other titheable matters and things, or a composition in value for the same, whereof no such moduses or customary payments were payable as aforesaid, except for such of the articles as were covered by  
the

the said moduses, and which were mentioned in the schedule to their said answer, and for which such of them as did not so pay were then ready, and had been always ready, to render and pay to the said *Henry Cornelius Wright*, or his agents, the value of the tithes due and payable for such last-mentioned articles so unaccounted for and not covered by the said moduses: but that the said agents respectively refused the said moduses, or customary payments, so tendered to them as aforesaid, demanding, on behalf of the said *Henry Cornelius Wright*, tithes of all the titheable matters of such of the Appellants as were Defendants to the said original bill, and the said *Richard Beadon*, deceased, in kind.

Such of the Appellants as were Defendants to the original bill, and the said *Richard Beadon*, deceased, in their answer insisted that such moduses or customary payments respectively, had always been due and payable to the said *Michael Dickson*, as aforesaid, and to his predecessors, vicars of the said parish of *Pitminster*, for the time being, or to such rectors or other persons entitled to tithes as aforesaid, or some composition in lieu thereof; and further, that until *Easter*, 1813, and for many years previously, although they were unable to state precisely for what number of years, a composition of sixpence in the pound according to the assessment for the relief of the poor in the parish of *Pitminster*, with the owners of lands who occupied, and one shilling in the pound on the annual value of premises, let at a rack rent, in lieu of the said moduses and tithes, were paid to the

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v.  
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Composition  
sixpence in  
pound accor  
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and tithes.

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and another.

the vicar of the said parish for the time being, by the several person or persons who for the time being had been in the occupation of the several lands and premises, in the occupation of such of the Appellants as were Defendants to the said original bill, and of the said *Richard Beadon*, deceased, respectively.

The answer admitted, that such last-mentioned composition of sixpence and one shilling in the pound was paid to the vicar of the parish for the time being, as a temporary composition only; and the answer stated that subsequent to *Easter*, 1803, until *Easter*, 1812, the said *Michael Dickson*, as such vicar, or his agents on his behalf, received from such of the Appellants as were Defendants to the said original bill, and the said *Richard Beadon*, deceased, respectively, and the occupiers of the lands and premises within the said parish, which were occupied by the same respectively, or some of them, the aforesaid moduses or customary payments, in lieu of and in respect of the tithes for which the same were paid and payable as aforesaid, and gave receipts for the same as such, and also received the tithes of the other titheable matters in kind, or a composition in lieu thereof. Such of the Appellants as were Defendants to the said original bill, and *Richard Beadon*, deceased, in their answer denied that any of the sums of money, and other things before insisted on as moduses or customary payments, were rendered or paid, or ever had been rendered, paid, or accepted, as a *temporary* composition, or temporary compositions  
only

only, or otherwise than as moduses, or that the same had commenced within the time of legal memory, or at any time or times had varied in amount; and they denied to their belief that such moduses or customary payments, or any pretended composition, except the composition of sixpence and shilling in the pound before mentioned, had ceased or been determined.

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and another

The Plaintiff having replied to the answer, and such of the Appellants as were Defendants to the said original bill, and *Richard Beadon*, deceased, having rejoined, and witnesses having been examined on both sides, and their depositions duly published, the cause was put into the paper for hearing; but before the cause came on to be heard, a commission of bankrupt was awarded and issued against the Plaintiff *Wright*, and the Respondents were chosen assignees of his estate and effects.

Witnesses  
examined, and  
cause set down

Plaintiff became  
bankrupt, and  
Respondents  
appointed assignees.

In *Michaelmas* term, 58 *Geo.* 3, the Respondents filed their bill of revivor and supplement against the Appellants, stating the before-mentioned proceedings, and also the bankruptcy of *Wright*, and that they, the Respondents, had been appointed assignees of his estate and effects, alleging the death of *Richard Beadon*, and the abatement of the said suit as to him:—and that *Beadon* had appointed the Appellant, *George Beadon*, his son, sole executor of his will, who had, on or about the 8th *July*, 1817, duly proved the same in the proper Eccle-

Bill of revivor  
and supplement

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v.

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and another.

Answer filed,  
and suit revived.

more than sufficient to answer and satisfy any claim or demand the Respondents might have against the estate of said *Richard Beadon*, in respect of the matters aforesaid: and prayed thereby that the suit, and all the proceedings therein, might stand and be revived against the Appellant *George Beadon*; and they further prayed an admission of assets, or an account of the estate and effects of the said *Richard Beadon*.

Cause heard.

The Appellants put in their answer to the bill of revivor and supplement, and the suit having been revived by an order made in the cause, dated the 23d day of *January*, 1818, the cause came on to be heard in the Exchequer Chamber on *Monday* the 13th of *April*, 1818, before *Sir Richard Richards, Lord Chief Baron*, when evidence was read by the Respondents in support of their case.

The further hearing having been adjourned, the cause came on to be further heard the 20th *April*, 1818, when the Respondents read further evidence in support of their case; and the Appellants also by their Counsel entered upon their defence, and read evidence in support of it; and the further hearing of the said cause was adjourned until the 22d of *April*, 1818, when the Appellants and Respondents read further evidence.

Evidence read  
by Respondents

The evidence read by the Respondents in support of the title of the vicar to their tithes in kind,  
claimed

pellants, the surviving Defendants to the original bill, and of *Richard Beadon*, deceased, and the depositions of certain witnesses to interrogatories, to prove by their own experience and by the declarations of persons deceased, *the payment of a composition to the vicar* for the time being, for *many years before the year 1803*.

  
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v,  
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and another.

The Appellants at that hearing took the objection, that the Respondents had not established their title to tithes in kind of the matters covered by the moduses ; but that objection was however overruled by the Lord Chief Baron.

Appellants' objections.

The Court took time to consider of judgment, and on the 29th *April* the Lord Chief Baron delivered judgment, decreeing an account of all the tithes demanded with costs. From that decree the Defendants appealed to the House of Lords.

Judgment.

On the part of the Appellants it was contended now (on the appeal), that such admissions, and the same depositions, did not by any means establish that the vicar was entitled to, or that any vicar, or those claiming under him, had ever received from the owners and occupiers of lands in the said parish, or the titheable places thereof, tithes in kind, or received such composition as being a composition for tithes in kind, for the several titheable matters covered by the respective moduses set up by the said answer; but on the contrary, the evidence so read in support of the

Argument on the appeal.

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and another.**

the claim of tithes in kind merely tended to establish, that such payments as had in fact been made, were payable to the vicar: but such evidence was so far from proving that the payments were made for tithes in kind exclusively, that the same evidence which proved payments to have been made to the vicar for the time being, also disclosed the fact, that such moduses were in truth claimed.

Evidence read  
on the part of  
Appellants at  
the hearing.

It was further urged by the Counsel for the Appellants, that the Appellants, in support of the moduses set up by their answers, read a considerable body of evidence; and among other evidence a terrier of the parish, dated in 1638, made by the vicar and churchwardens, and other substantial parishioners of the said parish, was put in, which it was insisted distinctly implied that such tithes as were payable to the vicar were, as to certain portions of them, payable in kind, and others of them by custom: That they also read the office copies of a bill, answer, and *replication*, in a cause instituted in the sixth year of King *William* the Third, in the Court of Exchequer, in which *John Anne*, clerk, who was then vicar of the parish, was the Plaintiff, and one *Joshua Marke*, who was then the occupier of certain of the lands in the said parish, not being part of the excepted lands, was Defendant:—that the vicar by his bill then claimed tithes in kind of all the titheable matters now insisted on by the Respondents, and the said *Joshua Marke* also

Office copies of  
bill, answer,  
and replication  
in a former suit.

also insisted on all the moduses or customary payments now insisted on by the Appellants, together with a certain modus for the agistment tithes of barren and unprofitable cattle; that the said complainant *John Anne* thereupon filed a special replication, by which he expressly admitted all the moduses then and now claimed, excepting that for agistment tithe. The Appellants also read the decree in the cause, dated the 8th of *February*, in *Hilary* term, in the eighth year of *William III.*, an office copy of an order made in the cause dated the 10th of *May*, ninth year of *William III.*, which decreed the payment of tithes in kind *for such agistment tithes* only, of the different tithes for which such bill had been filed.

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and another.

The Appellants also read various extracts from certain books kept by the vicars of the parish, containing entries of the tithes, moduses, and other dues received by them from the year 1673 down to the year 1708, from the occupiers of lands in the parish, by which it appeared that the moduses now claimed had been received from the respective occupiers of lands in the parish, not being the excepted lands, during the period last mentioned: and they urged, that in such books there were contained various entries, by which such moduses appeared to be mixed up with other payments, so that the amount of the sums actually entered in such books differed in amount, but there were not any entries, or any that could not be accounted for, which were inconsistent with such moduses, or which in any manner



before-mentioned terrier, the pleadings, and the decree in the said cause of *Anne v. Marke*, and the practice in the parish, to be inferred from the said entries in the tithe books, all tended distinctly to show that such moduses existed and were acknowledged by those most interested against them, before the composition of one shilling and sixpence in the pound was established as before stated.

They also contended by their Counsel that the evidence both of the Respondents and of the Appellants' witnesses showed, that during a very long period before the year 1803, subsequent to the year 1708, although the precise origin could not be shown, such customary payment, in lieu of tithes and moduses claimed by the vicar, of one shilling in the pound, according to the valuation at rack rent, upon occupiers, and sixpence in the pound upon the assessments to the poor-rates upon owners of lands in the said parish, had been paid to the vicar for the time being; and that nothing was to be inferred from the depositions of the witnesses that such payment was a composition for tithes in kind exclusively; but that on the contrary, the Respondents themselves rebutted any presumption of that kind, because they read and adopted as evidence from the answer to the original bill, that such customary payment had been in lieu as well of the moduses as of the tithes; and that so well was the present  
vicar

vicar satisfied that such moduses were a valid claim on the part of the parishioners, that, in the year 1803, (when some of the owners of lands within the parish consented to increase the composition,) he gave receipts to several of the parishioners, which expressly admitted the moduses, and he continued so to do down to the time when he assigned the tithes to *Wright*: and many of such receipts, signed by *Dickson*, were accordingly given in evidence.

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The Appellants further insisted at the appeal on the fact that the Respondents did not produce any evidence which contradicted the existence of such moduses, but principally relied upon the length of the customary payments, as being inconsistent therewith, added to the loose assertions of their witnesses, that they had not heard of such moduses—a species of evidence which, they submitted, in this peculiar case, was entitled to no weight whatever.

It was therefore now contended by

*Horne, Shadwell, and Wray*, the Counsel for the Appellants, that, under the circumstances, the Court of Exchequer ought to have dismissed the bill; or that one or more issues at law ought to be directed to try the validity of the moduses for the following reasons:—

1. Because, by the general rule of evidence,  
every

every vicar, or those claiming under him, must show title to the particular tithes claimed; and in the present case the Plaintiff did not establish, by sufficient evidence, that the vicar was *prima facie* entitled to the tithes *in kind* of those matters for which the answer insists, or moduses were payable.

2. Because the Appellants established by their evidence the existence and validity of such moduses, and therefore the Plaintiff's bill should have been dismissed, or, at least, issues should have been directed to try the moduses.

For the Respondents, on the other hand, *Martin* and *Pepys* insisted that the decree of the Court of Exchequer ought to be affirmed, for the following reasons:—

1. Because none of the moduses insisted upon by the answer were well pleaded, it being left wholly uncertain to what lands, or to what extent of lands, such moduses were intended to be pleaded, or what was the character or description of such moduses.

2. Because the lands admitted by the answer of the defendants to have been occupied by them, the tithes of which were alleged to be covered by such moduses, are not set forth in such answer with sufficient certainty or particularity of description.

3. Because

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could show, on the part of the Defendants, that moduses were effectual with respect to some, and that he was entitled to receive those moduses, if he was not entitled to tithes in kind of those particular matters to which such moduses refer.

Judgment.

That being so, another question arises, namely, this—It was contended (although I think very faintly contended) that a composition having been paid in this parish, that composition particularly being, generally speaking, a fixed and certain sum to be payable according to the poor's rate of one shilling in the pound, (and I instance this by way of illustration,) that that composition put an end to the moduses.

I wish to have it distinctly understood, as far as the point is worth having the subject understood, that if a person is bound to pay tithe in kind for some matters, and be entitled to insist upon a modus with respect to other matters, he, by entering into a composition as a composition, is not doing that which will put an end to the moduses, because it is possible that the composition may be for the tithes of all matters titheable, as well those which are to be rendered in kind as those to be covered by a modus.

Those points being established, the next question is, whether, looking through the whole of this evidence from the earliest time which appears here, to the last portion of evidence in point of period of time that is to be found, such a case is  
made .

made out by this evidence as against the vicar, as entitled the defendants, with reference to any of the titheable matters, to have had the bill dismissed, or entitle the defendants, with respect to any of the tithes claimed, to have said, you must take payment by way of modus, and not tithe in kind, or that at any rate there ought to be an issue to try that question.

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In order to do justice to the case, after looking at all the evidence that is printed during the recess in the Easter holidays, and having read this book in my hand, which is full from one end to the other, and I believe I have read every word that is to be found in it, undoubtedly the case strikes me in this way—that the oldest evidence to be found is evidence against the notion of having moduses, with respect to many valuable articles, the tithe of which is sought by this bill. There appears to have been a suit formerly by which the vicar claimed tithe in kind for many of these articles; and moduses not the same (although some of them are very much alike)—not exactly the same as those now pleaded, were set up in that case, and the vicar by his replication (for in those days it was not unusual to have a special replication in cases of this kind,) he says, (as the Court has entered it,) that to avoid expense and trouble he admits that modus, and that he has only a decree for agistment tithes; and if the usage and transaction in the parish had from that period (and that suit was a very old one) been agreeable to what was done in that case, I should

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have thought it a very strange thing for any Court to say, that because in that special replication those general terms to avoid loss of time and expense, and so on, were inserted, that therefore the fact of such a decree as evidence against the vicar should be considered as weak. But the truth is, that there is little or no evidence that those payments have been made conformably to what was admitted as moduses in that case.

There is one circumstance, however, which does appear to be the most difficult thing in the world to account for, which is, that this modus or moduses are paid and payable by the occupiers of the land, and distinguishing whether the occupiers were the owners as well as the occupiers, which might well be, and it does appear by the whole of the evidence that when the owner had the land in his own occupation he paid but sixpence in the pound according to the poor's rate, and when the occupier had it, he paid one shilling according to the poor's rate. That seems one of the most difficult things to make out, and it would not be so if, with respect to every titheable article whatever, there was a modus in the parish payable all alike, whether the person was only the occupier or both owner and occupier.

The result, therefore, appears to be this—that although there is to all the tithes of the parish some evidence that particular payments were made, of the nature and of the quantum that is stated in the answer of the Defendants, that there  
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has been, upon the whole, if even these moduses did exist, if they did exist from the time whereof the memory of man runneth not to the contrary, there have been such casual departures from an adherence to payments of that nature, that it seems to be perfectly unsafe, upon the whole of this evidence taken together, to conclude that such moduses did at this day exist; and I do not recollect that it was intimated at the bar that any other evidence could be offered than that which is to be found in the cases before us; and if upon that evidence a jury was to find for the moduses, it appears to me that the finding must be looked upon, judicially speaking, as founded in mistake.

I am, therefore, of opinion, that the decree ought not to be reversed or varied; but, at the same time, there are, I think, certain intimations, if I may use that word, that are contained in the evidence to be found in this case, which makes it appear to be not improbable, upon the presumption that if there was a little misapprehension in the evidence, that it would furnish such a case as might have entitled them to go to a jury, probably might have entitled them to receive relief at the hands of that jury. Therefore, under all the circumstances of the case, I cannot think that if this appeal is to be dismissed, that costs ought to be given.

Judgment affirmed, without costs.



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February 23.

The ATTORNEY-GENERAL v. BURRIDGE and others

CASE OF PORTSMOUTH HARBOUR.

*Effect and Construction of Grant (Royal).*

The Crown may grant, by letters patent, to a corporation, a town and borough, being caput portus, as Portsmouth, and all the lands between the high and low water-marks: but this subject-matter of grant, as being *jus privatum* in the king, must be subject to the *jus publicum* or public right of the king and people, to the easement of passing and repassing both over the water and the land.

Obstructions to such a right may be a nuisance.

The question of nuisance is matter of fact.

*Jurisdiction.*

The Court of Exchequer has jurisdiction to entertain a suit for abatement of such nuisance.

*Suit.*

The mode of proceeding in such suit may be by information by English bill; and the Court may determine the question on evidence, or may direct an issue.

AN information by English bill was in this case filed by his Majesty's Attorney-General on the behalf of the Crown, praying "that the Defendants might set forth *what right and interest they claimed in the wharf or quay, warehouse, and other erections and works (in the pleadings mentioned), or any of them, and how they make out the same*; and that they might be restrained by the order and injunction of the Court of Exchequer from raising or making any erections, buildings, or works on the ground within the harbour of Portsmouth, between high and low water marks; and that the said wharf or quay, warehouse, and other erections and works so made and created by Defendant, *William Burridge the elder*, as charged in the pleadings, might be abated and removed: and that the said harbour might be restored to its ancient condition, so that the sea may again flow and reflow over the piece or parcel of ground mentioned in the bill, in the same manner as the sea flowed and reflowed over the same before said Defendant, *William Burridge the elder*, began to make such wharf (&c.) as (&c.) from time (&c.): and that the same might be open and common for the passage and repassage, anchorage, mooring and lying of his Majesty's ships and vessels, and other ships and vessels, as the same was before the erection and making of such nuisance: and for further relief."

The

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the Information.

The Information (a) stated that by the royal prerogative the sea and sea coasts round this kingdom, as far as the sea flows and reflows between the high and low watermarks, and all the ports and havens of this kingdom, belong to his Majesty [and such ports and havens ought to be preserved for the use of his Majesty's ships and vessels, and the ships and vessels of all his Majesty's subjects and others, so that all persons may resort to or from the same], and his Majesty hath the right of superintendence and prerogative over the same, for the safety of the realm and the benefit of commerce, and for the common use and enjoyment of all persons resorting thereto, and to protect and preserve the same from all nuisances and obstructions whatsoever.

That the harbour of Portsmouth, in the county of Southampton, is an arm of the sea, where the tide flows and reflows for many miles up into the country, and the same is very useful for the safe riding of his Majesty's ships of war and other ships and vessels, and is and hath been from time

(a) The information in this case, which was very ably drawn with great care from a variety of precedents, is here set out; because it not only explains the nature of these cases, but furnishes a valuable precedent of pleading on the revenue side of this Court by information by English bill

filed by the Attorney-General on the part of the Crown, for the purpose of instituting the prerogative investigation, "Quo titulo" (&c.), against a subject claiming rights against the king or the public, in virtue of long possession and enjoyment.

whereof

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whereof the memory of man is not to the contrary, a public port and sea mart for the resort of all persons with their goods, wares and merchandizes, in the same manner as other ports and harbours within his Majesty's realm, and that in or near the said harbour is a dock or yard belonging to his Majesty for the building, repairing, or refitting ships of war for his Majesty's service, and also for providing stores for such of his Majesty's ships as shall come there or be in want thereof, and certain parts of the said harbour are used for the mooring of his Majesty's ships, and are called the King's Moorings.

That the erecting of any wharf or quay, warehouse, or other buildings in any part of the said harbour between the high and low water marks, or the making of any projection from the shore into the said harbour, or the preventing the water from flowing or reflowing over the land where it formerly flowed and reflowed, will be a great prejudice to the said harbour, and by degrees block up or much narrow and incommode the navigation there and the passage, repassage, anchorage, mooring, and lying of vessels, and particularly by obstructing the flux and reflux or lessening the force of the tide, and in process of time may entirely destroy the said harbour, and so far prejudice and annoy the same, that his Majesty's ships and vessels and other vessels of his subjects will not be able to come into or go out of the said harbour, or to lie there with safety, and particularly

larly may form a bar of mud without the harbour mouth, or block and choke up the entrance of the said harbour.

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[That there is a certain arm, or part of the said harbour of *Portsmouth*, on the *Portsmouth* side whereof, called the *Camber*, which lies within the victualling and town quays, between the back part of the East and North sides of the Point of *Portsmouth* and the town of *Portsmouth* (a); and] that

Stating part of  
the Information.

*William Burridge* the elder, of *Portsmouth* aforesaid, one of the Defendants after named, hath lately, that is to say, some time in the year 1808, erected and built, or caused to be erected and built, on the mudland between the high and low water marks, in the said arm or part of the said harbour, called the *Camber*, part of a large warehouse, containing in width on the East part thereof, 73 feet or thereabouts; on the West, extending in a diagonal or angular line, 74 feet or thereabouts; on the North, 24 feet, or thereabouts; and on the South, 15 feet, or thereabouts; and bounded on the East by a wharf called the *Baltic Wharf*, erected on piles driven into the mudland of the said harbour as hereinafter mentioned; on the West by the other or remaining part of the said warehouse above the high water mark; on the North, by other mudland inclosed by piles in the said harbour as hereinafter mentioned; and on the South by a shed built on piles on the said mudland as after also mentioned; and said *William Burridge* the

Erections, (&c.)  
complained of

(a) See plan annexed.

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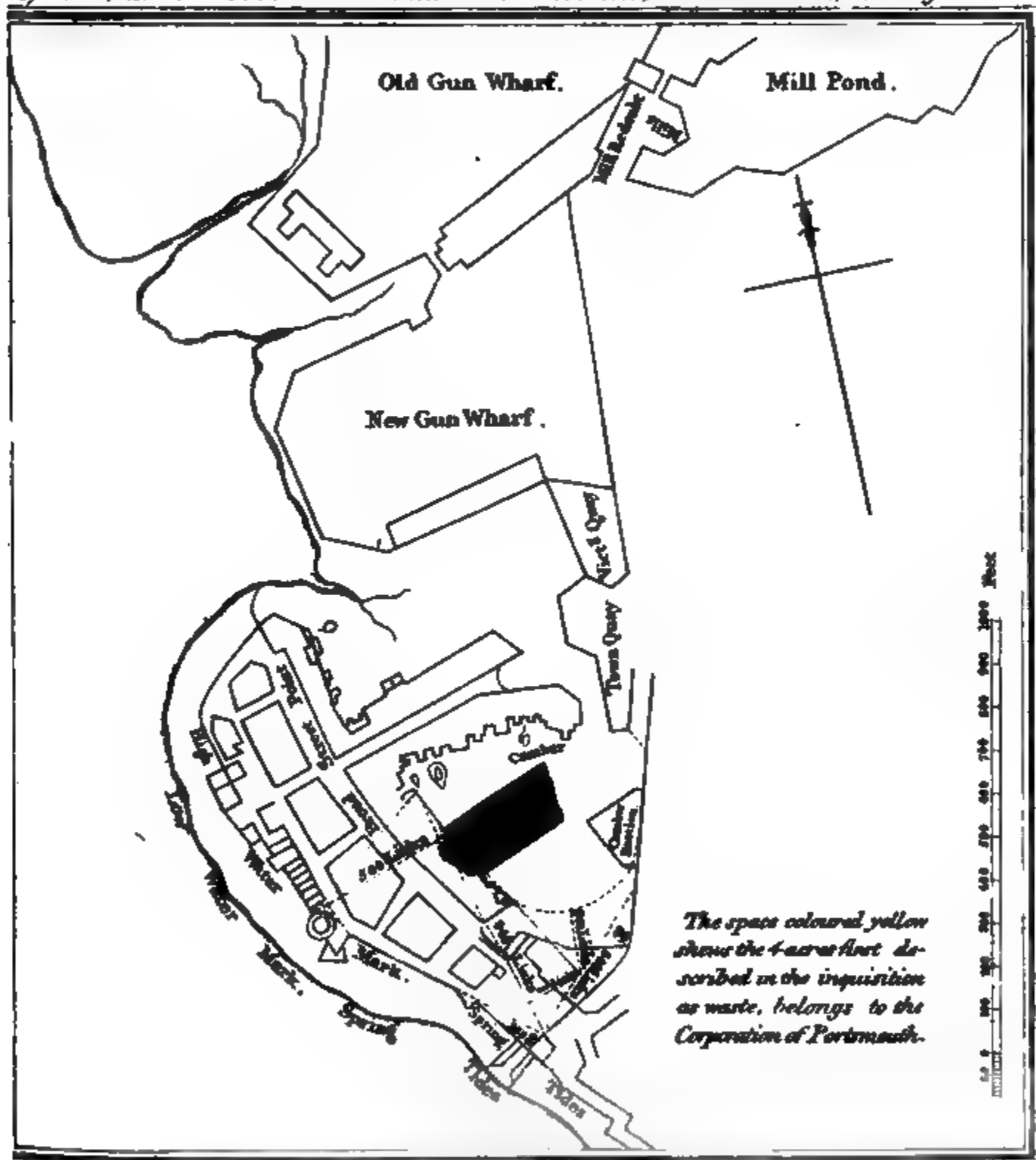
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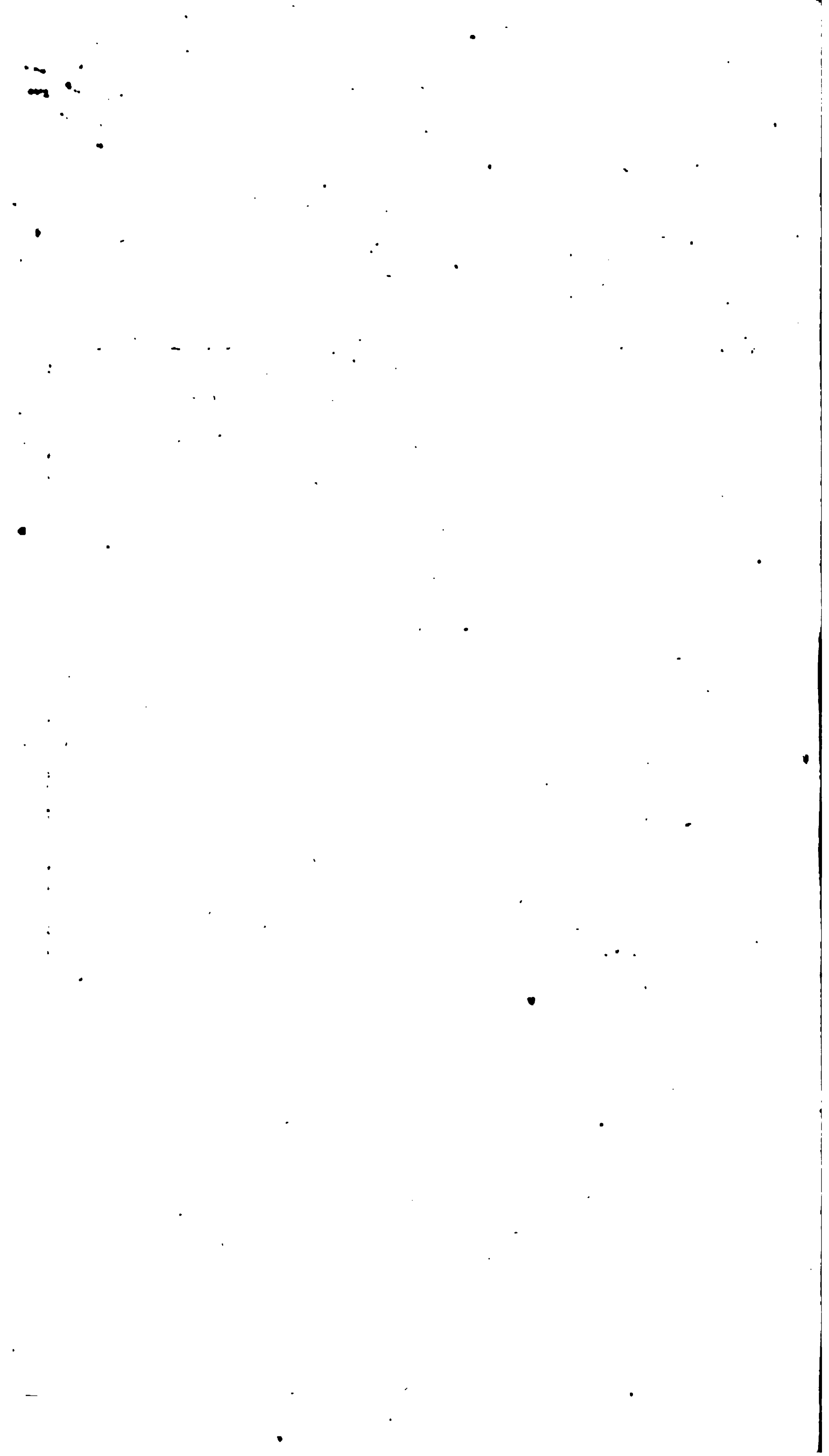
elder, also, in or about the year 1808, made and erected, or caused to be made and erected on the mudland between the high and low water marks in the said arm or part of the said harbour at *Portsmouth*, called the *Camber*, a wharf or quay (called the *Baltic Wharf* or *Quay*) of plank on piles driven into the said mudland, extending from the said East side of said warehouse towards said low water mark in said harbour, and which wharf is of the following dimensions, that is to say, in length from East to West on the North and South side thereof 92 feet 6 inches or thereabouts, and in width from North to South at the East end thereof 72 feet or thereabouts, and at the West end thereof 73 feet or thereabouts, and bounded on the West, North and South by mudland enclosed with piles as after mentioned in the said harbour between high and low water marks, and on the East by the said part of the said warehouse so situate below the high water mark as aforesaid; and said *William Burridge* the elder, also, in or about the year 1808, erected and built, or caused to be erected and built, on said wharf or quay, a storehouse of wood and certain offices adjoining the same, and he also erected or built, or caused to be erected and built, on the mudland between high and low water marks there, a shed adjoining to and on the South side of said wharf or quay; and said *William Burridge* the elder, also in or about the year 1808, fixed a ship or vessel on the mudland on the North side of said wharf or quay, and between said high and low water marks in said harbour, and he converted such ship

# PLAN.

*Shewing the Timber Pond &c. objected to on the part of the Crown, as an obstruction and nuisance in the Harbour. Page 354*



*The space coloured yellow shows the 4-acre plot described in the inquiry as waste, belongs to the Corporation of Portsmouth.*



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ship or vessel into a storehouse; and said *William Burridge* the elder, also in or about the year 1808, caused a boom and piles to be placed on the mudland of said harbour between the high and low water marks there around the whole of said wharf and premises, including said ship or vessel, which boom and piles form an inclosure of a large space of ground; viz. fifty thousand and thirty four square feet or thereabouts, and such inclosure is used by the said *William Burridge* the elder as a timber pound, and extends in length from East to West on the North side thereof, three hundred and three feet or thereabouts and on the South side thereof 236 feet or thereabouts, and in breadth at the East end thereof 186 feet or thereabouts, and at the West end thereof 174 feet or thereabouts, and is bounded on the East by the high water marks of the Point at *Portsmouth* and on the West, North and South by other mudland of said harbour.

That at all times previous to the erection and making of such wharf or quay and other erections and works, the sea at spring tides flowed and reflowed over the soil between high and low water marks on or in which such wharf or quay, warehouse and other erection and works are erected and made, and up to the high water marks or shore at *Portsmouth* aforesaid, and at neap tides the sea always flowed over the same or the greatest part thereof; and His Majesty's ships of war, and other ships or vessels and boats, and all ships, vessels, and boats of His Majesty's subjects

Mischief of  
works to the  
harbour.



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subjects and others, had free passage over such soil when covered with water, and did or might cast anchor and lie there or otherwise use and enjoy the same in such manner as any other part of the arm of the sea aforesaid between high and low water marks has been used or enjoyed, or has been free and open for the passage and repassage, anchorage and lying of ships or vessels and boats at any time before the said erections and works were began to be erected, and there was not any erection, building or other thing whatsoever which could prevent the flowing and reflowing of the sea on or over the soil between the high and low water marks on or in which such wharf or quay, warehouse, and other erections and works have been erected and made as aforesaid, or could prevent the passage and repassage, anchoring, and lying of ships and vessels on or over such soil, or the free use and enjoyment thereof when covered with water as part or parcel of the harbour or port of *Portsmouth* aforesaid.

That said wharf or quay, warehouse and other erections and works, which have been so erected and made as aforesaid, are in their present state, and if continued will be a great nuisance and injury to said harbour, and will also be an obstruction to a quantity of water proportionable to their dimensions coming into and going out of said harbour on such flux and reflux of the tide, and thereby prevent a great scouring and cleaning of the lower parts of the channel of said harbour of soilage there, and greatly endanger the loss of  
said

said harbour; and if similar erections and works shall be made in all parts of said harbour between high and low water marks, the same will entirely destroy said harbour, or render said harbour useless, so that His Majesty's ships of war and other ships and vessels of burthen will not be able to come into and go out of the same as they have always used to do, or if such ships or vessels should be able to come into or go out of said harbour, the same will not be able to remain long there or ride with any safety.

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That soon after said *William Burridge* the elder Notice.  
began to make such wharf or quay, warehouse and other erections and works, he had notice from the principal officers and commissioners of the navy, and others by their order, that such erections and works, if completed, would be injurious to said harbour, and he was required to desist from making such buildings and obstructions; but said *William Burridge* the elder disregarded such notice, and he, notwithstanding such notice, completed said wharf or quay, warehouse, and other erections and works.

That said *William Burridge* the elder, after he had, in defiance of said notice, completed said wharf or quay, warehouse, and other erections and works, was served with notice, bearing date the 4th day of *October*, 1813, from the Solicitor of the Admiralty, or his agent at *Portsmouth*, whereby said *William Burridge* was required to  
remove

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remove the same; but he disregarded such last-mentioned notice.

That said *William Burrige* was served with said last-mentioned notice, and on or about the 28th day of *May*, 1814, a commission of bankrupt, under the great seal of *Great Britain*, was awarded and issued against said *William Burrige* the elder, *William Burrige* the younger, and *John Burrige*, of *Portsmouth* aforesaid, bankers and copartners, and they were thereupon duly found and declared bankrupts; and *Martin Thomas*, late of *Gosport* aforesaid, but now of *Charterhouse Street*, in the city of *London*, Gent.; *Robert Wilkinson*, of *Turnwheel Lane*, in the said city of *London*, Gent.; *William Edwards*, of *Portsmouth* aforesaid, butcher; and *Hans Peter Engstrom*, (since deceased,) were duly chosen and appointed assignees of their estate and effects, and a bargain and sale of their real estate, and an assignment of their personal estate and effects, were duly executed to them the said assignees by the major part of the commissioners in the said commission named, as by the said commission and the proceedings under the same, when produced, will appear.

That said *William Burrige* the elder hath, notwithstanding his said bankruptcy, ever since continued and now is in the occupation of said wharf or quay, warehouse, and other erections and works, as tenant to said assignees, and hath lately obtained his certificate.

That

That said wharf or quay, warehouse, and other erections and works, being a public nuisance, and injurious to said harbour of *Portsmouth* as aforesaid, it was well hoped that they would have been removed, as in justice and equity ought to have been the case.

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The information then suggested, that the Defendants, combining, pretend some right, title or interest in said Defendants, the mayor, aldermen, and burgesses of the borough of *Portsmouth*, in or to the soil or ground adjoining to said arm or part of said harbour, called the *Camber*, under and by virtue of divers ancient grants and charters from his Majesty's predecessors, Kings and Queens of *England*, to the mayor, aldermen, and burgesses of the borough of *Portsmouth*, and their successors for ever; and that by virtue thereof they, said Defendants, the mayor, aldermen, and burgesses of said borough of *Portsmouth*, may erect what buildings they please upon the shore of said arm or part of said harbour called the *Camber*, between the high and low water marks there; and that said Defendant, *William Burrige* the elder, under whom said Defendants, the assignees, claim, was the purchaser of or had obtained some lease from the said other defendants, the mayor, aldermen, and burgesses of *Portsmouth*, of divers acres of land within said arm or part of said harbour called the *Camber*, and between the high and low water marks aforesaid, whereof or within or on part of which he said Defendant, *William Burrige* the elder, hath erected and built said wharf or quay, warehouse,

Suggestions of  
defence made by  
the Bill.

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warehouse, and other erections and works; and said Defendant insists upon such pretended right under and by virtue of such grants and charters.

Whereas his Majesty's Attorney-General charged, That such Grants and Charters, if any such there were, were void and of no force and effect to pass the soil on which the said nuisances have been erected, nor any other land between high and low water mark within said harbour, and also that they have been abandoned, but if not yet, that such part of said harbour of *Portsmouth*, whereon or wherein such wharf or quay, warehouse, and other erections and works have been erected and made as aforesaid, is not nor could be included in such grants or charters, or any of them.

That no persons or person have or has been in possession of such part of said harbour under colour or pretence of such grants or charters, or any of them, until said Defendant, *William Burrige* the elder, began to erect and build said wharf or quay, warehouse, and other erections and works as aforesaid; and that at all times before such time the sea flowed and reflowed in and over such part of said harbour; and that his Majesty's ships, and all other ships and vessels, had free passage and re-passage over the same, and used or might have used the same for anchoring, mooring, and lying of ships or vessels, without any interruption whatsoever; and his Majesty and his

his subjects were in that manner in possession and enjoyment of the same.

That if such part of said harbour had been well granted by any grants or charters of his Majesty's predecessors, Kings and Queens of England, or any of them, to any person or persons under whom said Defendants claim, yet such grants or charters did not and could not extend to deprive his Majesty or his subjects of the free use and enjoyment of such part of said harbour, or the free passage, anchorage, moorage and lying of all ships and vessels, and could not extend to authorize the erecting, maintaining, or continuing any public nuisance within the said harbour, but all such erections, buildings and things as are or is or may be a public nuisance ought to be abated or removed, notwithstanding such grants and charters as aforesaid, or any of them, if any such there be, and the same are valid and subsisting grants or charters, and so the said Defendants will at sometimes admit; but then they pretend that said wharf or quay, warehouse, and other erections and works, are not a public nuisance, or of any prejudice whatever to said harbour, the contrary whereof his Majesty's Attorney-General charges to be true; and that said Defendants, or any or either of them, had not nor hath any right, under any pretence whatsoever, to build upon any part of said harbour between high and low water mark, and more especially upon the spots on which said wharf or quay, warehouse, and other erections and works have been made and erected

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erected as aforesaid, or to narrow said harbour at high water, or to lessen the flux and reflux of the tide there, or to annoy the ships of his Majesty or others passing or repassing, mooring, lying and being in said harbour; and at other times said Defendants pretend, that by an act of parliament made in the 9th year of the reign of his present Majesty, intituled, “An Act to amend and render more effectual an Act made in the 21st year of the reign of King *James* the First, intituled, ‘An Act for the general Quiet of the Subject against all Pretences of Concealment whatsoever,’” it is amongst other things enacted, “that the King’s Majesty, his heirs or successors, shall not, at any time after the passing the said act, sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in any wise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (other than liberties and franchises,) or for or in any wise concerning the revenue, issues, or profits thereof, or make any title, claim, challenge, or demand, of, in, or to the same, or any of them, by reason of any right or title which had not first accrued or grown, or which should not, after the passing of said act, first accrue and grow, or within the space of 60 years next before the filing, issuing, and commencing of every action, plaint, information, commission, or other suit or proceeding, as should at any time or times after the passing said act be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors or ancestors,

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cestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing had or lawfully claimed, or should have or lawfully claim, had or should have been answered by force and virtue of any such right or title to the same, the rents, revenues, interests and profits thereof, or the rents, issues and profits of any honor, manor, or other hereditaments, whereof the premises in question should be part or parcel, within said space of 60 years, or that the same had or should have been duly in charge to his Majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, had or should have stood insuper of record within the said space of 60 years; and that said defendants, the mayor, aldermen, and burgesses of *Portsmouth*, have for sixty years last past been in the actual possession and receipt of the rents and profits of said land within said harbour, and between high and low water marks aforesaid, upon or in which such wharf or quay, warehouse, and other erections and works have been made and erected; and that his Majesty or any of his progenitors, predecessors or ancestors, hath not and have not been answered by force or virtue of any right or title, any rents, revenues, issues or profits of said piece of land within 60 years last aforesaid, and that the same hath not been duly in charge to his Majesty or any of his progenitors, predecessors or ancestors: and said Defendants, *Martin Thomas*, *Robert Wilkinson*, and *William Edwards*, claim to be entitled to said land on which said wharf or quay, warehouse,



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and other erections and works have been erected and made as aforesaid, under and by virtue of some lease granted by said mayor, aldermen, and burgesses of said borough of *Portsmouth* to said Defendant *William Burrige*, or otherwise.

Charges in Bill.

That the title of said Defendants to said land is not aided by said act, and that such piece of land was continually, until said wharf or quay, warehouse, and other erections and works were made by said Defendant, *William Burrige*, the elder, as aforesaid, a piece of land over which the sea flowed and reflowed, and the same yielded no rents, issues or profits; but until the said wharf or quay, warehouse, and the other erections and works were begun as aforesaid, his Majesty, and his royal progenitors and predecessors, and all his Majesty's subjects, and others, had the use and enjoyment thereof as part of said harbour of *Portsmouth*, and as a parcel of land over which the sea flowed and reflowed, in the same manner as his Majesty and his subjects had the use and enjoyment of other parcels of land between high and low water marks within said harbour and the other shores of his Majesty's kingdom; and said Defendants, and those under whom they claim, did not before said year 1808 make any erections or buildings upon said land, on or in which said Defendant, *William Burrige*, the elder, erected said wharf or quay, warehouse, and other erections and works, or exercise any act of ownership in or upon the same, or take any rents, issues or profits, or derive any benefit therefrom.

That

That if said wharf or quay, and other erections and works, had not been entirely made and finished upwards of sixty years before the filing of this information, and said Defendants, or those under whom they claim, had been in quiet possession thereof, and in the receipt of the rents, issues and profits thereof, for sixty years last past, yet in regard the same are a common nuisance, and tend to the injury and destruction of said harbour, such act of parliament as aforesaid cannot and does not extend to protect the same from being abated and removed, and the same, therefore, ought to be abated and removed; but to this said Defendants object, and they persist in continuing said nuisance; and said Defendants, *Robert Williams, William Moffatt, William Hugh Burgess, and Thomas Lane*, the younger, *Daniel Henry Rucker, John Anthony Rucker*, and *Henry John Rucker*, claim some interest in said wharf or quay, warehouse, and other erections and works, but what such interest is, and how they make out the same, they refuse to discover.

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The answer of the Defendant, *William Burridge*, in substance stated and set out the granting part of a charter of 13 Charles I. to the corporation of the borough of *Portsmouth*, (a) of groundings and anchorages for vessels in the haven of the borough to lade and be unladen upon the banks and wharfs of the borough, and a grant of the borough, (with a confirmation of former grants,) and all the mes-

Substance of  
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(a) See the grant in Appendix.

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suages, lands and tenements, (&c.) before granted to the corporation, under which the Defendant set up a title in the corporation to all the waste lands within the town and borough, and all the lands between high and low water marks on such parts of the beach and shores of the haven or harbour within the town and borough; and he claimed a right under a lease, dated 1 *June*, 1801, from the corporation to him, of the place in which the wharf, &c. had been made, by the description of a piece or parcel of mud land, or beach land, lying on the west side of the *Camber*, (a) (&c.) to erect and continue a stage, (&c.)

The answer alleged, that in 1802, the Defendant became the yearly tenant of the corporation of another piece of beach or mud land, surrounding the before-mentioned parcel, occupied and used by him as a timber pound, admitting the buildings charged in the bill to have been erected thereon by him there, and that the tide had previously flowed and reflowed over the same ground, but denied that any vessel drawing more than six feet water could have passed over the ground there.

The answer denied that the wharf or stage and timber pound were prejudicial to the harbour generally and particularly.

The several answers of the other Defendants

(a) See the plan.

presented

presented the same case and ground of defence in substance and effect.

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The cause came on to be heard before the *Lord Chief Baron* (RICHARDS) upon several different occasions and on the various hearings, which occupied from time to time many days.

*Jervis* and *Wyatt* (Counsel to the Admiralty) appeared on the part of the Crown in support of the bill: and,

*Gaselee*, *Selwyn*, *Pepys*, and *Carter*, on behalf of the Defendants.

The points made in support of the Bill were, 1st, that the Crown had no right to grant the land, nor for the purpose of the objects of the grant; 2dly, that the land had not been granted;—that the parties Defendant had no right so to use it as they had done;—and lastly, that it was a nuisance and destructive of the harbour of *Portsmouth*, to have erected the works and made the inclosures, which it was the object of the suit to abate and remove.

On the part of the Defendants it was contended, that they had the right of possession to the soil, as claimed by the answer; and that the erections complained of were a lawful enjoyment of the property acquired by the letters-patent of the Crown; and were not in any respect a public nuisance or detrimental to the harbour of *Portsmouth*;—that they had not caused any impediment

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ment, obstruction or hinderance, to the passage and repassage of such boats and other vessels as aforesaid have passed there at any time before, and that they did not check the flowing and reflowing of the tide.

A very voluminous body of evidence was collected and reduced to depositions on both sides.

Very much discussion took place on the question of fact, whether the land between the high and low water marks, in that part of the *Camber*, within which the erections and inclosures were made, was within the grant by the Crown of the town and borough of *Portsmouth* to the corporation, or not; but the principal points were the right of the Defendants under a grant, which it was attempted to impeach on the ground of illegality, and the question of the fact of nuisance, and of the jurisdiction of the Court to inquire of and decree respecting it, under these proceedings by information and answer. (a)

RICHARDS, *Lord Chief Baron*, now delivered judgment.

The object of this information was to remove buildings and erections (&c. stating the prayer of the bill and the alternatives prayed). I am enabled to premise, for there can be no doubt of it, that the law with respect to the general rights

(a) The argument on those points will be found fully stated in the subsequent case of *Par-meter v. Sir V. Gibbs*.

of the Crown are clear, and that is admitted on all sides. It is a doctrine of ancient establishment, that the shore between the high and low water marks belongs *primâ facie* to the King; and it is clear that the lands in question are between the ordinary high and low water marks, and consequently *primâ facie* belong to the King; but it is equally clear that the King may grant his private right therein to subjects. It is upon such a grant that the Defendants in this suit mainly rely; and such a title it is clearly incumbent on them to prove against the King.

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The subject may acquire a right of property in these mud lands by grant, charter, or prescription. The first question is, whether the Defendant has, in this case, established his title by either of those means of acquiring the right of possession, and shewn that the right has been taken out of the King and transferred to him. It is incumbent on the Defendants to prove that case. Now I have bestowed as much pains as I could in considering the evidence and availing myself of the advantage of the very able addresses, replete with argument and learning on both sides, but I have not been able by all the diligence of which I am master to satisfy my conscience on the case as to the equity between the right of the Crown and the claim of the Defendant.

There has been a great deal of evidence laid before me by the parties on both sides, and I have given it an equal attention on either side.

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The Defendant having the onus of proof on him, his evidence consists of acts of ownership inconsistent with the right of possession being in the Crown; but he must go much further and shew that the right is in him. Without discussing that point so in dispute between the Crown and the Defendant, which I carefully abstain from doing, I have come to the conclusion that I must have further assistance, in order to enable me to determine the right, and therefore I am of opinion that an issue must be directed for the purpose of having the claim of title set up by the Defendants thoroughly investigated.

There is no dispute on the part of the Defendants on the present occasion, as to the jurisdiction of this Court to entertain and decide the matter in dispute with respect to that part of the case; the learning of their counsel has precluded that difficulty here which seems to have been imposed upon the Court in other cases of this nature.

If therefore the Crown think fit to proceed to a Decree, there must be an issue directed to try the question of right.

If the verdict on that issue should be in favor of the Crown, it will not be necessary to proceed further with the suit.

The Defendants in this case do not claim a franchise in the port by this defence, but simply a right of possession and enjoyment of the land  
in

in question by virtue of a grant; and if the Crown has the right to possession of the soil, the Crown may do with its own property what it thinks fit, as any private person may, and may grant to a subject.

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If the verdict should be against the Crown, and the Defendants should be right on that point, then the other very important question will arise—the question of nuisance.

The Crown has no doubt a right to abate a nuisance notwithstanding it be on the lands of a subject. That necessarily gives rise to another question in this case.

On that point an objection is made by the Defendant's counsel to the jurisdiction of the Court, and it is contended that if the Defendants have the right to the land, this Court cannot, on this proceeding, interfere to abate the nuisance by its decree.

I have however no doubt that this Court has jurisdiction in this case. This Court and the Court of Chancery have each of them frequently interfered in such cases in the way now prayed by this bill, by administering the law in the way of injunction against the parties, restraining them from building, and ordering them to abate and remove what they have already erected. And if so, and if the Crown should take an issue and the cause comes back, and should eventually proceed to termination, this Court may, as in the ordinary proceeding



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proceeding by injunction, make an ultimate decree according to the exigency of the case. A great many instances are to be found of issues in such cases having been directed by the Courts of equity, which could not have been ordered unless the Court had the power to act upon the verdict by carrying the proceeding further, because the Court has ultimately to decide upon the whole case and to determine what should be done by pronouncing a final decree.

As to the question of nuisance.

It is quite clear the people have a public interest in all ports. This is laid down in a work you all have at your fingers' ends, Lord *Hale's* Treatise De Portibus Maris, part 2, ch. 7, concerning the jus publicum of ports and harbours.

He says, that when a port is settled by such means (that is by licence or charter of the King, or that which presumes and supplies it, viz. custom and prescription,) though the soil and franchise or dominions thereof *prima facie* be in the King, or by derivation from him in a subject; yet that jus privatum is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade, and intercourse.

So that if the land in question be the property of the corporation, yet if the erections complained of

of be in fact a nuisance it must be abated, and this Court is bound to do so by its decree, if what the Defendants have erected shall have been found to be a nuisance by the verdict of a jury.

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Another proposition of Lord *Hale* is, that persons having acquired the *jus privatum* of the Crown by grant must not so use their right as to occasion a common nuisance, and if these Defendants should have created a nuisance by these erections in the *Camber* to the harbour, it must be abated notwithstanding they should be entitled to the soil and to the erections otherwise properly built upon it. Upon the whole I am clearly of opinion that the present suit raises as proper a case for consideration of a Jury as ever came before a Court.

Lord *Hale*, after having defined some of the many nuisances that may happen in ports, says (*a*), "I proceed now to set down the means whereby they may be prevented, or remedied, appointed, or allowed by law. And these provisions are of two kinds: I. By the common law. II. By particular acts of parliament.

"I. As to the provisions by the common law, we are to observe, that as the common law hath intrusted the king with the patronage and protection of the *jura publica*, as highways, public rivers, parts of the sea, and the like, so the care of pre-

(*a*) De Portibus Maris, p. 2, ch. 7, p. 87.—(Hargrave's MS. Tracts.)

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venting and reforming of public nuisances therein is left to him, and his courts of justice; the prosecutions for them are in his name and the fines for the defects or annoyances in them are part of his revenue."

This is in my opinion a very proper proceeding for the purpose and object of the suit, and there are precedents for it without number.

It is clear that the question whether a port is straitened by building too far into the water is *questio facti* and not *questio juris*, and it is therefore proper that it should be determined by a Jury.

It has been for that reason in the argument of this case contended, that in every such case the Court is not competent to decide, but that it must be referred to the determination of a Jury in every instance.

I am not however upon this occasion prepared to determine that general proposition of law, that in every case there must be an issue directed to try the fact where the question is nuisance or no nuisance; for if a Court see no reasonable doubt, its duty is to determine the matter at once, because it is its duty to avoid putting parties to unnecessary expence; and there is danger in directing a trial where it is not necessary and can be of no use, and where no further justice can be obtained by it, or where justice can be done without. I throw this out as a general application of an opinion I have long entertained on  
this

this subject of directing issues, and for the purpose of declaring my sentiments on that important point.

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Where, however, the Court can not determine without such assistance, an issue may be properly directed to assist, not to controul, the determination of the Court. In such cases a jury is always a necessary medium for dispelling doubt or difficulty, where the Court is satisfied with their conduct under the circumstances; and in such cases the personal convenience and accommodation to the judge of sending a matter to a jury are incalculable, and this is the true ground and the reasonable foundation of the practice of directing issues out of Courts of equity.

I have taken the utmost pains in the investigation of the evidence to justify the order I am about to make, and I have been anxious to decide it if I could without further inquiry.

There is a great body of evidence put in on the part of the Crown to show that these erections are a nuisance. There is also very much evidence on the other side, much of which does not militate with that offered by the Crown, but there is also very much which does, the object of which is to prove that the erections are not detrimental to the harbour.

Depositions in these cases, however, are not the best media of testimony, because the cross-examination

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examination of witnesses is not so substantially an efficient cross-examination, as to produce in a case of this sort the necessary conviction in the breast of a judge. It is known by the cross-examiner what the witness has stated on his examination in chief, because his answers are never disclosed till after publication. Nothing can be known from the evidence furnished on paper to affect the character of the testimony, or to enable the Court to estimate the value of the different witnesses, for no comparison can be instituted between such men as Rennie and Walker or one pilot and another.


For these reasons I think there should be a further investigation.

Under these circumstances, if the Crown thinks right, I shall direct an issue on the first point, the question of property; and if that be established on the part of the Defendants by a verdict against the Crown, there must be another issue to try the question of nuisance.

I purposely avoid saying more at present, as I am yet ultimately to decide between the parties when the issues shall have been tried; I therefore direct the issues without giving any intimation of my opinion, which for the present may for very obvious reasons be much better spared.

The just weight of the evidence cannot otherwise be fully appreciated than by the course of issues. The

The form of the issues must be matter of future consideration, and may be settled out of Court.

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To keep the two questions distinct, there must be two distinct records.

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After the judgment had been delivered it was suggested on the part of the Crown by the counsel for the Admiralty, that there should be a trial of the issues at Bar; but

The LORD CHIEF BARON directed that an application for that purpose should be made to the Court.

His Lordship said that he remembered *Lord Thurlow* requiring that such an application should be made to the Court of Exchequer for trial of an issue at bar: and he (the Chief Baron) observed, that if it had been consistent with the course in practice, he should have inserted in the order that the issue should be tried at bar.

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\* \* This case was never further proceeded in.

For the argument and determination of the principal points made, see the two following cases of *The Attorney-General v. Parmeter* and *Parmeter v. Sir V. Gibbs*.

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The

1811.

23 December.

The ATTORNEY-GENERAL v. PARMETER and  
others.

IN RE PORTSMOUTH HARBOUR,

Construction of  
royal charter,  
and validity of  
grant of the  
Crown by let-  
ters-patent.

Where a part  
of the sea coast  
or shore, being  
the property of  
the Crown, and  
giving *jus*  
*privatum* to the  
king, is granted  
to a subject for  
uses, or to be  
enjoyed so as to  
be detrimental  
to the *jus pub-*  
*licum* therein,  
such grant is  
void as to such  
parts as are open  
to such objec-  
tion, if acted  
upon so as to  
effect nuisance  
by working in-  
jury to the  
public right:—  
or it is a grant  
which does not  
divest the  
Crown or invest  
the grantee.

THIS was an information by English bill filed  
by the Attorney-General against the Defendants,  
praying, “ that the Defendants and their agents,  
servants, and workmen might be restrained by the  
order and *injunction* of this Court from proceed-  
ing further in the said several erections, buildings,  
and works thereinbefore mentioned.

“ And that the wharf, quay or stage, dock,  
bridge, storehouse and timber pound, and the  
other buildings, erections, and works erected and  
made, or erecting and making there, might be  
abated and removed; and that the said harbour  
might be restored to its ancient condition, so that  
the sea might again flow and reflow, &c. as be-  
fore, &c. and that the same might be again open,  
&c.” The

*Seemle*, that grants of the Crown for the benefit of the King, by augmenting the revenue,  
founded on inquisition *ad quod bonum*, must be conformable with the finding—must be for the  
advantage of the Crown—must be acted upon promptly—must be upheld by possession and  
enjoyment—and the grantees must fulfil all continuing considerations, or the right of possession  
will not pass thereby from the Crown.

*Nuisance.*

Buildings, erections, and inclosures between the high and low water marks in the harbour of  
Portsmouth, interrupting the flux and reflux of the tide, abated by decree of the Court of Exche-  
quer as a nuisance, where made under the sanction and authority of the Corporation having a  
grant from the Crown by charter.

*Jurisdiction.*

The Court of Exchequer may decree such an abatement.

*Mode of Proceeding.*

The King's Attorney-General, on the part of the Crown, may proceed in such cases for the  
purpose of protecting either the *jus privatum* of the King from the purpresture, or the *jus publicum*  
of the subject from nuisance, by information on the King's Remembrancer's side of the Exchequer  
by English bill, praying a personal decree against the Defendants in the suit.

The Information in this case having stated, as in the preceding case, the preliminary matter contained in the three first paragraphs of the stating part of that bill alleged, That the then Defendants, some time in the year 1784, began to erect and make, and did erect and make on the Gosport side of the said harbour, and within the high and low water marks there, and near to a place which hath been commonly used for the mooring his Majesty's ships, and called the King's Moorings, a certain wharf, quay or stage, 67 feet and eight inches; or thereabouts, in breadth at the west end, and at the east 80 feet or thereabouts, and in length 226 feet or thereabouts, and extending from the shore or high water-mark, towards the low water-mark, 336 feet or thereabouts; and in which said wharf, quay or stage, the said then Defendants had placed and set a large ship for the purpose of a dry dock, with gates there, to prevent the entrance of the water into the same, and that the said then Defendants also at the west end of the said wharf, quay or stage, had erected and made a wooden bridge, supported by piles of wood, driven into the mud land of the said harbour, to communicate from the shore on the Gosport side of the said harbour with the said wharf, quay or stage; and that the said then Defendants also on the south side of the west end of the said wharf, quay or stage, had erected a storehouse, of the length of 70 feet or thereabouts, and of the breadth of 19 feet or thereabouts; and also on the north side thereof two

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other small erections for an office or counting-house, and a pitch-house; and that on the north side of the said wharf, quay or stage, they had placed and set on the mud land of the said harbour another large ship, also intended for a dock, and had placed and deposited soil, stones and rubbish, between the said last mentioned ship and the said wharf, quay or stage, up to the side of the said last mentioned ship, for the purpose of embanking the mud land lying between the said last mentioned ship and the said wharf, quay or stage.

That the ground upon which the said wharf, quay or stage, dock, bridge, storehouse, and other buildings, erections and works were made, was a piece of mud land, bounded by other mud land on the north, east, and south, and particularly by a blacksmith's shop or building of the said Appellant *Richard White*, in the occupation of *John Adams*, and partly by the passage or way leading from the *Gosport* shore to the before mentioned bridge and wharf, quay or stage, on the west part thereof.

That the then Defendants had lately inclosed with wooden piles, driven into the mud, and secured by planks or pales, a parcel of mud land to the south-west of the town of *Gosport*, between high and low water marks, which said mud land so inclosed was used as and for a timber pound, and contained in length, from north to south, 200 feet

feet, or thereabouts, and in breadth at the north end thereof 63 feet 9 inches, or thereabouts, at the south end thereof 88 feet, or thereabouts; and that the said piece of mud land, so inclosed as aforesaid for a timber pound, was bounded by the shore at *Gosport* on the east, by a timber yard or pound, and store-house, in the occupation of one *John Whitcomb*, on the north, and by other mud land on the west and south.


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That before and in the year 1784, and at all times previous to the erecting, making, and placing of such wharf, quay or stage, dock, bridge, store-house, timber pound, and other buildings, erections and works, the sea, at spring tides, flowed and reflowed over the several pieces of soil or mud land between high and low water marks on or in which such wharf, quay, dock, bridge, storehouse, and timber pound, and other erections and works were erected and made up to the shore or high water mark at *Gosport* aforesaid; and that at neap tides the sea also flowed over the same, or the greatest part thereof; and that his Majesty's ships of war, and other ships, vessels, and boats, and all other ships, vessels and boats of his Majesty's subjects, and others, had free passage over such soil when covered with water, and did or might cast anchor and lie there, or otherwise use and enjoy the same, in such manner as any other parts of the arm of the sea aforesaid, between high and low water marks, have been used or enjoyed, or have been free and open for the passage

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and re-passage, anchorage, and lying of ships or vessels, and boats; and that before and in the said year 1784, or at any time before the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections, and works were begun to be erected and made as aforesaid, there was not any erection or building, or other thing whatsoever, which could prevent the flowing or reflowing of the sea in or over the said several pieces of soil or mud land between the high and low water marks, on or in which the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, had been erected and made as aforesaid, and which could prevent the passage and re-passage, anchorage and lying of ships and vessels on or over such several pieces of soil or mud land, or the free use and enjoyment thereof, when covered with water, as part or parcel of the harbour or port of *Portsmouth* aforesaid.

Buildings stated  
 to be a nuisance.

And the Attorney-General, by his information, stated, That the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, which had been so erected, built and made as aforesaid, were a nuisance and injury, and if continued, would be a great nuisance and injury to the said harbour, and would prejudice the aforesaid moorings, and would also be an obstruction to a quantity of water proportionable to their dimensions coming  
 into

into and going out of the said harbour on each flux and reflux of the tide, and thereby prevent a great scouring and cleansing of the lower part of the channel of the said harbour of soilage there, and greatly endanger the loss of the said harbour; and that if similar erections, buildings and works, should be made in all parts of the said harbour between high and low water marks, the same would entirely destroy the said harbour, or render the said harbour useless, so that his Majesty's ships and vessels, and other ships and vessels of burthen, would not be able to come into or go out of the said harbour as they had always been used to do; or if such ships and vessels should be able to come into or go out of the said harbour, the same would not be able to remain long there, or ride with any safety.

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That soon after the then Defendants began to make such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, they, or some or one of them, had notice from the Commissioners of the Navy, and others by their order, that such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, if completed, would be injurious to the said harbour; and that they the then Defendants, or some or one of them, had been applied to, and requested to desist from building and making, and to remove the same.

 Notice to De-  
fendants.

That

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That the then Defendants, disregarding such notice and applications as aforesaid, continued building and finishing, and finished the said wharf, quay or stage, dock, bridge, storehouse, timber pound, and other buildings, erections and works, and the same so erected and finished they upheld, maintained, and continued, to the great prejudice and damage of his Majesty's navy, and to the great injury of the said port or harbour of *Portsmouth*, and to the common nuisance and injury of all his Majesty's subjects, and of all ships and vessels which might have occasion to pass and repass, and to anchor, moor, and lie within the said harbour, and more especially to the mooring his Majesty's ships at the place called the *King's Moorings* aforesaid, and that the then Defendants also threatened and intended to erect or make other wharfs and quays, erections and buildings, in or near the same place, which would be also nuisances.

Pretence suggested.  
Title by grant.

The information then alleged, that the then Defendants pretended that his late Majesty King Charles the First, by certain letters-patent, granted to certain persons therein named and their heirs, all and singular the lands and marshes surrounded and overflowed, or subject to the overflowing of the sea in the said county of *Southampton*, from the county of *Sussex*, beginning at *Emsworth*, to *Hurst Castle*, near the confines of the county of *Dorset*, containing 5432 acres, or thereabouts, and that they the said Defendants,

Defendants, or some or one of them, had purchased of some persons or person claiming under such letters-patent a large quantity of land within the said harbour of *Portsmouth*, and between the high and low water marks aforesaid, whereon or wherein, or on parts of which they the said then Defendants, or some or one of them, had erected and made the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections, and works as aforesaid; and that they the said then Defendants insisted they had a right so to do by virtue of the said letters-patent.

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But that in and by the said information the said Attorney-General charged that such letters-patent (if any such there were) were void and of no force or effect to pass the soil on which the said nuisances had been erected, nor any other land between the high and low water marks within the said harbour; and that the said letters-patent had been abandoned, and if not, yet that such parts of the said harbour of *Portsmouth*, whereon or wherein such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections, and works had been erected and made as aforesaid, were not, nor could be included in such grant.

Charge grant  
 void quoad.

And the information further charged, that no land or mud or oaze was granted by the said alleged letters-patent, which lay between a creek  
 or

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or lake now called *Forton* or *Weevil Lake*, and formerly called *Cason Creek*, and another creek or lake now called *Blockhouse Lake*, and formerly called *Stoke Lake*, except eight acres, or thereabouts, lying close to the said lake or creek, formerly called *Cason Creek*, on the south side thereof; and that the whole of the mud land claimed by the said then Defendants, or any of them, on which the said wharf, quay, or stage, dock, bridge, storehouse, erections and works were erected, lay between the said lake or creek called *Blockhouse Lake*, and the lake or creek called *Forton* or *Weevil Lake*, and particularly the land upon which the aforesaid wharf, quay or stage, dock, bridge, storehouse, erections and works had been made, is situate between the said two creeks or lakes; and that the said two creeks or lakes were at the distance of 3332 feet, or thereabouts, from each other, and the space between them contained 70 acres of mud land, or thereabouts, of which only 8 acres purported to be granted by the said alleged letters-patent, and which said acres are no part of the mud land of which the said then Defendants, or any of them, had possessed themselves; and that the said wharf, quay or stage, dock, bridge, storehouse, and other erections and works, were erected 2,600 feet, or thereabouts, south from the said lake called *Forton Lake*, and 650 feet, or thereabouts, north from the said lake called *Stoke Lake*; and the said 70 acres, lying between the said two lakes, are very important and material to the well-being of the said harbour, and that it

was

was extremely prejudicial to the said harbour to erect any buildings, erections, and projections, on any part of the said 70 acres, and the said Attorney-General charged that the other piece of mud land claimed by the said then Defendants, in which the said timber pound was erected and made, lay to the south-west of the town of *Gosport* aforesaid, and was not included in the said alleged letters-patent, and that the said piece of mud land, on which the said timber pound was erected, was also extremely important and material to the well-being of the said harbour; but that the said then Defendants alleged and insisted, that the said several pieces of land upon which the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other erections and works were erected and made, were within the said grant and described therein.

And the Attorney-General charged that no person or persons have or had been in possession of such part of the said harbour under colour or pretence of the said grant, or otherwise, until the said then Defendants began to make such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works; and that at all times before such time, the sea flowed and reflowed on and over such parts of the said harbour; and that his Majesty's ships, and all other ships, vessels and boats, had free passage and repassage over the same, and used or might have used the same for the anchoring

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ing, mooring and lying of ships, vessels and boats, without any interruption whatsoever; and that his Majesty and his subjects were, in that manner, in the possession or enjoyment of the same.

And that if such parts of the said harbour as aforesaid had been well granted by the crown to any person or persons, under whom the said then Defendants, or any of them, claimed, yet that such grant did not and could not extend to deprive his Majesty or his subjects of the free use and enjoyment of such parts of the said harbour, or the free passage, repassage, and anchorage, mooring and lying of all ships and vessels; and could not extend to authorize the erecting, making or continuing any public nuisance or obstruction in the said harbour; but that all such erections, buildings, and things as were or might be a public nuisance, ought to be abated and removed, notwithstanding any such grant as aforesaid, if any such there were, and the same was a valid and subsisting grant.

That the said then Defendants, or any or either of them, had no right, under any pretence whatever, to build upon any part of the said harbour between high and low water marks, and more especially upon the spot on which such wharf, quay or stage, dock, bridge, storehouse, timber pound, and other buildings, erections and works have been made, or to narrow the said harbour at highwater, or to lessen the flux and reflux of the  
tide

tide there, or to annoy the ships of his Majesty, or any others passing or repassing, mooring, lying or being in the said harbour; and that if the said then Defendants, or any or either of them, were or was entitled to the soil of the said harbour, between high and low water marks, where the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works had been made, by grant of any of his Majesty's royal predecessors, or otherwise; yet that they, or any or either of them, were not thereby entitled to make and erect the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, or to make any erections or works whatever, which would prevent or diminish the flowing or reflowing of the water, or injure the aforesaid moorings, or be in any manner a nuisance or annoyance to the said harbour.

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The said information then suggested, that the Defendants pretended, (&c.) the statute 9 Geo. III. c.   ; and charged, that the title of the Defendants to the said land was not aided by the said act of parliament, and that such pieces of land were continually, until within a few years last past, and particularly before and in the year 1784, and until such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, were made by the said then Defendants as aforesaid, pieces of land, over which the sea flowed and reflowed, and the same yielded no rents, issues or profits, but before and in

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in the said year 1784, and until such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, were begun as aforesaid, his Majesty, and his royal progenitors and predecessors, and all his Majesty's subjects and others had the use and enjoyment thereof, as part of the said harbour of *Portsmouth*, and as parcels of land over which the sea flowed and reflowed, in the same manner as his Majesty and his subjects, and others, had the use and enjoyment of other parcels of land between high and low water marks within the said harbour, and the other shores of his Majesty's kingdom; and that the said then Defendants, or those under whom they claimed, did not, before the said year 1784, make any erections, buildings or works, upon such pieces or parcels of land on or in which they have made such wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works as aforesaid, or exercise any act of ownership in or upon the same, nor take any rent, issues or profits, or derive any benefit therefrom.

That if the said wharf, quay or stage, dock, bridge, storehouse and timber pound, and other buildings, erections and works, had been entirely made upwards of 60 years before the filing of the said information, and the said then Defendants, or those under whom they claimed, had been in quiet possession thereof, and in receipt of the rents, issues and profits thereof, for 60 years last past; yet in regard the same are a common nuisance,

sance, and tend to the injury and destruction of the said harbour, such act of parliament as aforesaid could not, and did not extend to protect the same from being abated and removed, and that the same ought to be abated and removed accordingly.

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The Defendants, by their answer to the information, after admitting the prerogative of the crown respecting the coasts of this kingdom, and that his Majesty had the right of superintendency over the said coasts for the purposes in the information mentioned, and that the harbour of *Portsmouth* was an arm of the sea, and a public port and sea-mark, and that there was a dock near the said harbour belonging to his Majesty, for the purposes in the said information mentioned, and that certain parts of the said harbour were commonly used for the mooring his Majesty's ships and vessels, and were called the *King's Moorings*; they stated that they did not know that the said wharf, quay or stage, timber pound, or other buildings, erections and works, were prejudicial to the said harbour; that they were jointly in the possession and occupation of a wharf, quay or stage, and a dock, bridge, storehouse, and a small building used as a counting-house, and another small building used as a pitch-house, all situate on the *Gosport* side of the said harbour, and within the high and low water marks of the sea there; and that they were in possession of the same as the absolute owners thereof in fee simple, and that the said wharf, quay or stage, dock, bridge, storehouse,

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storehouse and other buildings, were made and erected by them the said Defendants, or at their expense, in or about the year 1784; and that they had ever since been in the possession or enjoyment thereof, without any interruption or disturbance whatever, (save by the institution of the said suit,) and that the land on which the said wharf, quay or stage, dock, bridge, storehouse and other buildings were made and erected, and the fee simple and inheritance thereof were purchased by them in the said year 1784, and were duly conveyed to, or to the use of them and their heirs accordingly, in consideration of the sum of 107*l.* paid by them; and they admitted the dimensions and situation of the said wharf, quay or stage, dock, bridge, storehouse, and other buildings, erections and works, as stated in the said information.

That they were the owners of a stranded ship or vessel lying upon the mud land of the said harbour, near the north side of the said wharf, quay or stage, and that the same had lain there about 18 years, and was not intended by them for a dock or for any particular purpose in that situation; and the said Defendants admitted, that the ground upon which the said buildings, erections and works had been made, was, prior to the making and erecting the same, a piece of mud land, and was bounded as in the said information stated; and the said then Defendants admitted, that they had in the year 1796, or thereabouts, inclosed with wooden piles driven into the mud  
or

or gravel, and secured by planks or pales, a parcel of mud land to the south-west of the town of *Gosport*, and between the high and low water marks of the sea, and which mud land so inclosed was used by them as a timber pound, and contained in length from north to south 200 feet, or thereabouts, and in breadth at the north end thereof 65 feet 9 inches, or thereabouts, and at the south end thereof 88 feet, or thereabouts, and that the mud land so inclosed was bounded as in the said answer mentioned; but they stated that the said timber pound was not a close pound, and that the same did not prevent the flux and reflux of the tide; and they by their said answer admitted, that previously to, and until the making the said several buildings, erections and works, the sea did, at spring tides, flow and reflow over the land or ground on which such erections, buildings and works were made, and up to the shore or high water mark at *Gosport* aforesaid, but that previously to that time the sea to their knowledge did not, at neap tides, flow and reflow over any part of the land on which any such erections, buildings and works were made, and that ships or vessels, other than boats, could not and did not float over the same.

That the said wharf, quay or stage was raised, made and filled up with mud or soil taken out of the said harbour, and that therefore the said harbour is capable of containing the same quantity of water as it was before the making the said wharf, quay or stage, and they stated that they did not know

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know that his Majesty or the public was or were in possession of any part of the land or soil on which any of the said erections, buildings and works were made, save that previously to the making the same, such boats or vessels of the public as did not require a greater depth of water might have passed and repassed over such land or soil, or some part thereof; and they admitted, that previously to the filing the said information, they received notice from the Commissioners of his Majesty's Navy, that the said erections, buildings and works, were injurious to the said harbour, and that they the said then Defendants were required to remove the same, and that they had not so done.

The Defendants by their answer further stated, that they believed and admitted that his late Majesty King Charles I. by letters-patent, as stated in the said information, granted to Dame *Mary Wandesford*, wife of Sir *George Wandesford*, and to the said Sir *George Wandesford*, their heirs and assigns for ever, certain pieces of saltmarsh and oazy lands and grounds in the said letters-patent mentioned; and they insisted that the words of the said letters-patent were sufficiently comprehensive to include the lands upon which the said wharf, quay or stage, dock, bridge, storehouse, timber pound, and the said other buildings, erections and works had been erected, and they insisted on the full benefit of the said letters-patent; and they admitted that the whole of the land on which the said wharf, quay or stage, and the said dock, bridge, storehouse, and other buildings, erections and works were

were made and erected, lay between the two lakes or creeks in the information mentioned, and that the said two lakes or creeks are at such distances from each other as in the said information stated; and also that the space between them contained such quantity of land as in the said information mentioned, and that the spot of ground on which the said last-mentioned erections and works were made, was on the south, at such distance as in the said information mentioned, from the said lake called *Forton Lake*, and was on the north at such distance as in the said information mentioned, from the said lake called *Stoke Lake*.

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And the Defendants, after admitting the act of parliament (9 *Geo.* 3. c. 16.) and referring thereto, stated, that they purchased the land on which the said wharf, quay or stage, and the said dock, bridge, storehouse and other buildings were erected and made as aforesaid, in the said year 1784, of *James Francis Perkins*, then of *Winkton*, in the parish of *Christchurch Twyneham*, in the county of *Southampton*, Esquire, and *John Compton*, then of *Harbridge* in the same county, Esquire, and that such land was by indentures of lease and release, dated the 28th and 29th days of *September*, 1785, duly conveyed by them the said *James Francis Perkins* and *John Compton*, to or in trust for the said then Defendants; and that in such indenture of release the said *James Francis Perkins* was described as the only brother and heir at law of *Edward Perkins*, then late of *Winkton* aforesaid,

Deduction of  
title of Defend-  
ants.



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Esquire, deceased, who was therein described as the eldest son and heir at law of *James Francis Perkins*, then late of *Winkton* aforesaid, Esquire, deceased; and that in the said indenture of release the said *John Compton* was described as the nephew and devisee named in the last will and testament of *John Willis*, then late of *Ringwood*, in the county of *Southampton*, Gentleman, deceased, who was therein described as the eldest son and heir at law and devisee in the last will and testament of *James Willis*, then late of *Ringwood* aforesaid, Gentleman, deceased.

That from what appeared in and from the title deeds and writings relating to the said lands so purchased by and conveyed to them as aforesaid, they were induced to believe and did believe that the said *James Francis Perkins* and *John Compton*, derived their title to such land from or under the said other persons so named in the said indenture of release, some or one of them; and that those persons, some or one of them, derived their or his title thereto from or under certain conveyances made by the said Dame *Mary Wandesford*, and certain mesne conveyances and assurances; and that she the said Dame *Mary Wandesford* survived the said Sir *George Wandesford*, and by such survivorship became solely entitled to the whole of the lands granted by the said letters patent.

That since the said purchase and conveyance so made by and to them as aforesaid, they, or any  
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or either of them, had not rendered or paid, and that they did not know or believe that any or either of the persons under or through whom the said then Defendants claimed, ever rendered or paid to any person whomsoever any rent whatsoever, for any part of the land on which the said wharf, quay or stage, and the said dock, bridge, storehouse and other buildings, were erected, or for any of such erections and works; and they stated that they did not believe that his Majesty, or any of his progenitors, predecessors or ancestors, or any person or persons, bodies politic or corporate, under whom his Majesty any thing had or lawfully claimed, or should have or lawfully claim, had, within the space of 60 years next preceding the filing the said information or institution of this suit, been answered by force or virtue of any such right to the same, or otherwise, any rents, issues or profits whatsoever, for or in respect of any part of the said last mentioned land, or of any of the said last mentioned erections and works; and that such land, or any part thereof, or such erections and works, or any or either of them, was not, nor were, nor had been, at any time within the space of 60 years, in charge to his Majesty, or any of his progenitors, predecessors, or ancestors, nor had stood, *insuper* of record, to the knowledge and belief of them the said then Defendants. And that with respect to the last-mentioned land, and the said last mentioned erections and works, they hoped they should have the same benefit of the said act of parliament, and the

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aforesaid length of possession, and of the said letters patent, and other matters, as if they had pleaded the same in bar to the said information.

And with respect to the said piece of mud land on which the said timber pound had been made as aforesaid, they submitted to the judgment of the said Court, whether or no, under the circumstances of the case, they ought to be deprived of the possession of such timber pound.

T. T. 1809,
 E. & T. T. 1810.

The cause came on to be heard in *Trinity Term* 1809, and in *Easter* and *Trinity Terms* 1810, upon a great mass of evidence furnished by the depositions of the various witnesses on either side, principally as to the question of nuisance.

It was argued a second time by the Solicitor-General (Sir *Thomas Plomer*), *Jervis*, and *Wyatt* for the Crown, in support of the prayer of the information, and by

Sir *Arthur Pigott*, *Hart*, and *Johnson*, for the Defendants.

The questions made on either side were—

1st. The validity of the title or grant.

2d The extent of it if valid, and whether it included the locus in quo or ground on which the alleged obstructions were erected.

3d. Whether.

3d. Whether the grant had not been abandoned, and

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Lastly, Whether the erections, &c. complained of were or were not a public nuisance injurious to the harbour.

The case having been fully argued and re-argued on both sides (a), the *Lord Chief Baron* now delivered the judgment of the Court as follows:—

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MACDONALD, C. B.— In this cause the Judgment of the Court has stood over for some time, and that not so much by reason of any difficulty in the case, as of its extreme importance.

Judgment.

It was an information filed by the Attorney-General, complaining of a nuisance in the harbour of *Portsmouth* in several instances. A previous discussion referring to the case of the *Attorney-General v. Richards* (b) has attracted the attention of the Court to the deed itself, by which it is supposed that the spot upon which the nuisance complained of is erected was conveyed. It was argued at first upon the single ground of the fact of nuisance, making the question one of mere fact, whether the erections were a nuisance or not. In the case of the *Attorney-General v. Richards* the nuisance was very manifest, and it was abated. In the course, however, of agitating the question in the way in which it has been now put, it has become necessary to examine the nature of this instrument itself (c),

(a) For the main points of the argument see the next case.

(b) 2 Anstr. 603.

(c) See Appendix.

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not that I myself entertained the least doubt as to its validity in the case of *Richards*; though there was no occasion at that time to examine the instrument itself: but it being thought necessary, in the further agitation of this question, to have the deed examined and debated at the bar, that has been done, and done with great ability.

The importance of this question is made manifest by the testimony of two, I suppose, of the ablest men in the world upon subjects of this kind, namely, Mr. *Rennie* and Mr. *Mylne*. Those gentlemen are clearly of opinion, that although of no very great magnitude in the present instance, yet as far as it goes it is a nuisance, and an obstruction in the harbour. There are several witnesses, it is true, upon the part of the Defendants, who go the length of saying that it is not only no nuisance, but that it is of great service in the harbour. However, these gentlemen themselves surveyed the harbour, having been sent down expressly for that purpose, and they are of opinion that it is a nuisance detrimental to the harbour, and, except one small spot, that it is not within the grant itself. But it is either within the grant or it is not: if it is within the grant, I think it may be easily shown that the grant is good for nothing. It is perfectly clear that all the soil under the salt water between high-water mark and low-water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in a great many instances to the subject, but that is always subservient to the public right  
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of the King's subjects generally. It is compared by Lord *Hale*, with his usual simplicity, to the case of a highway. The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within this grant.

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Upon the first argument it was simply contended that the erection was a nuisance, but upon the second argument the grant itself was impeached. Now I take it that nothing can be clearer than that the King can in no degree affect the public right of the subject passing and re-passing upon the salt water; he cannot affect that by any thing which can be done by him. Lord *Hale* lays down clearly, *that ports, creeks, and havens are the subjects of the public right*; he describes what those are—a port more immediately accommodated for protection, both naturally and artificially—a haven, that which does naturally protect, and where ships may ride or lie in safety—and a creek, a member of a port where there is no customer or comptroller, but where there are certain officers for the purpose of collecting the King's revenues (*a*). In none of these places, therefore, can the public right be waived, although there might be a grant of the soil; but such grant must be considered as subject to that public right, which cannot be disturbed.

The grant at present in question is a grant that was made in the year 1628, and down to the year

(*a*) De Portibus Maris, part ii. ch. ii. pp. 46, 47, 48.

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1785 nothing was ever done upon it. The commission which issued in order to hold the inquisition upon which the grant proceeded, it will be necessary somewhat to examine. It will be found that there is more granted in its terms considerably than the commission warranted, for the inquisition goes greatly beyond it. The letters-patent recite the commission and the inquisition. They recite that a commission issued upon the 13th of *February*, 1625, directed to the mayor of the borough of *Lymington* and some others, directing them by jury to make the following inquiries. They were to survey and view, as well by the oaths of lawful men of the county of *Southampton*, as by the examination and deposition of credible persons, all and singular the ports, creeks, lakes and lands which thentofore were surrounded and overflown with the sea, and which lie and abut on or near the town of *Emsworth* and a variety of other places, and amongst the rest the town of *Lymington* and the port called *Key-Haven*; and in like manner to enquire whether the aforesaid lands and other premises so surrounded and overflown with the sea, could or could not be gained and secured from the overflowing of the sea, and of the number of acres of the same lands, and to what castles, towns, or other particular places they are situated and abutted, and whether the gaining and acquiring of the lands and other premises so to be recovered from the overflowing of the sea, would be any damage or prejudice to any person or persons: and also whether *the gaining and acquiring the said lands* and other premises so overflown by the sea would

would be *for the benefit* and advantage of the several parts of the county aforesaid, and to the increase of the revenue of us and our successors: and they were commanded that they should deliver the survey and inquisition as soon as they could, and at longest from the day of *Easter* in one month next following, to the Barons of the *Exchequer*." So that we see promptitude is one object in this proceeding; for it is to be executed in a very little time, that is, between the 13th of *February* and the *Easter* following, about three weeks, which will be observed on by and by.

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Then the letters-patent state an inquisition taken in the county of *Southampton*, which is very material. The commissioners say, "they have considered all the circumstances mentioned in the commission relating to the premises, by the oaths of certain persons, and that they find the lands in the commission aforesaid mentioned, extend themselves from the town of *Emsworth*, in the county aforesaid, situate in the east part of the county, upon a lake in the county of *Sussex*, and so extend westwardly to the town of *Langstone*, in the county of *Southampton*, including all creeks, lakes, and surrounding grounds in and about the isle of *Halinge*, in the county of *Southampton*, and including part of the port lying within the isle of *Halinge* aforesaid and the town of *Emsworth*, in the county of *Southampton*, and from the aforesaid town of *Langstone*, and extending from the said town of *Langstone* further west, to the marsh called *Drayton Marsh*, including all surrounding grounds and part



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part of the port of *Langstone* aforesaid, and extending further west from the aforesaid mark to the town of *Wymaring*, in the said county of *Southampton*, including all creeks, lakes, and surrounded grounds in and about the isle of *Portsea*, in the said county of *Southampton*, and extending westward from the town of *Wymaring* aforesaid to the town and castle of *Porchester*, including all the surrounded grounds part of the port of *Portsmouth*, in the county of *Southampton*, the commission having expressly excluded any ports whatever, and having said only ‘*near to or abutting on ports*’;” therefore care was taken in the commission at least to avoid the trespassing on any part of the creek whatever; but the inquisition lays down an immense quantity of land fronting almost the whole of the county of *Southampton*, and amongst the rest includes part of several ports, and among these the port of *Portsmouth*. It says, “including the port of *Lymington*, the port called *Key Haven*, a certain place called *Pennington Bay*,” and so on. And moreover the aforesaid jurors say, “that all the *small ports*, creeks, lakes, and parts of great ports above specified, described in two geographical tables or maps of survey made by *Edward Mansel*, Gent., and shown as evidence to the jurors aforesaid upon the taking of his inquisition, amount in the whole to 3923 acres, overflown and surrounded with the sea; and that the aforesaid lands overflown and surrounded”—those are a different thing—“described likewise in the said two maps of survey, amount in the whole to 1500 acres, and that the acquiring and obtaining  
of

of the aforesaid lands from the overflowing or surrounding of the sea will not be, as it is reported, any prejudice or damage to any person or persons; and that the acquiring or obtaining of the aforesaid lands from the overflowing and surrounding with the sea, as it is said, are and for the future will be for the great advantage, benefit and profit of the several parts of the county aforesaid respectively adjoining."

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Now here there is nothing said with respect to the interest of the Crown. The commission directed that it should be matter of inquiry how far it would be for the advantage of the Crown. No return is made to that part of the commission in this inquisition, but it expressly transgresses the direction in the commission, and lays the foundation of a future grant of those smaller ports and creeks, and part of the port of *Portsmouth*.

Perhaps I might stop here at once and say, if in point of fact these ports and creeks, and part of the port of *Portsmouth*, is comprehended in the grant, that is by no means what the Crown could grant, so as to affect the jus publicum, which is the right of the subject universally.

It goes on and says, that these surveys were remitted to the Exchequer. They are not, however, to be found; and it is very much to be lamented that they are not. Then the grant proceeds to state, "Whereas, for and in consideration of the good, true, faithful and acceptable service

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service done and bestowed for our most dear father deceased, and us, by our late beloved servant *Robert Pamplin*, deceased, late one of the yeomen of the wardrobe of our robes, we intended and made our royal promise to give,"—Let us see what the property is, "to him, his heirs and assigns for ever, all and singular the lands and marshes surrounded and overflown, or subject to the overflowing of the sea, in our said county of *Southampton*." "All and singular the lands and marshes surrounded and overflown." If that means all lands which are overflown, it comprehends the whole here specified—"And in pursuance of which our said royal promise, the aforesaid *Robert Pamplin*, together with *Mary Wandsford*, widow of *George Wandsford*, deceased, one of the daughters and heirs apparent of the said *Robert Pamplin*" and so on—"Know ye that in consideration and in compensation of the great expense heretofore, as we are informed, as well by *Mary Wandsford* and *William Wandsford* done and bestowed, as by the said *Mary Wandsford* and *William Wandsford*, their heirs and assigns, for the future to be expended and bestowed in fencing in with walls and recovering the said premises from the sea, or so much of them as could be fenced in and recovered from the sea, or they shall undertake or attempt for the increase of the revenue of our Crown of England, and for divers other causes and considerations," and so on.


Then we have here the purpose for which these marsh lands were granted; they are to be fenced  
in

in and recovered from the sea, and that too with walls, and which they shall undertake or attempt. Then if *Portsmouth Harbour* composes, or any part of it composes any share of this grant, that part which is comprehended within the grant is to be walled in and the subject excluded, and that “for the increase of the revenue of the Crown of *England*.” “Such as they shall undertake or attempt,”—Are they to undertake or attempt at the distance of 10,000 years? Does not undertake and attempt necessarily mean within a reasonable time? What may be a reasonable time may be in some cases matter of law, and in others matter of fact; but the distance between 1628 and 1784 is not what the Crown expected when it contemplated that there should be an undertaking and attempt, but that that should be within a reasonable time.

Then it proceeds to enumerate a vast variety of different parcels, very great in point of number, amounting to some thousands of acres, and, among others, that part is supposed to be comprehended upon which these erections are made.

In contradiction to that it is contended by the Crown that this is not, except as to some little spot, comprehended within this grant; but that if it be comprehended within the grant, the grant cannot operate upon it according to law; and if it is not comprehended there is no pretence for retaining it.

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The grant, after having enumerated a vast number of marshes and oazes, proceeds to grant in general words "all other our lands, feedings, pastures, meadows, marshes, salt marshes and glibses, wracks and lands, which formerly were or now are overflown, or subject to the overflowing of the sea, shores, coasts, gravel and sands, with all the increments of the sea, and all our profits, emoluments, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances incident and belonging thereto, and which were lately recovered, forsaken, or left bare and dry by and from the sea, with all benefit of the sea, and all their rights, members, and appurtenances incident or appurtenant, and which at any time, from time to time hereafter, shall be recovered, forsaken, or left bare and dry by and from the sea, in, upon, near or about the aforesaid towns of *Emsworth*," and so forth; and, among the rest, the island of *Portsea*, the castle and town of *Porchester*, the port of *Portsmouth*, *Fareham* haven, &c. Then it proceeds further to grant all those subject matters, by whatever name they be known or understood, "situate, lying and being, coming, growing, renewing, happening or arising in or near the aforesaid towns, islands, castles, creeks, ports, rivers and havens, or within any of them, or any of the aforesaid lands, tenements, meadows; feedings, pastures, salt marshes, marsh lands overflown or subject to the overflowing of the sea, shores, creeks, ports, havens, and other premises above by these presents granted, whenever the same shall be banked, fenced, gained and

and recovered from the sea, or otherwise forsaken and left bare by the sea,"—so that we have in every part of this grant *creeks and ports* of every denomination, the *port of Portsmouth included*.

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There then follow provisions (a) which show most manifestly that it was intended that this grant, if it were to take effect at all, should take effect speedily, for it gives a remission of tithes, when this soil should be recovered by banking, for the term of seven years. It was considered, therefore, that the grant, if to take effect at all, was to take effect speedily; and that for the first seven years after the ground was recovered, no tithe should be paid. It goes on further to reserve a rent of fourpence an acre for some parts, and a penny an acre in other parts, and that rent is specially provided to commence on the succeeding *St. Andrew's day*, in the year 1630. The grant itself was made in 1628, and therefore it was expected that in the course of those two years something would arise to the Crown in the shape of rent.

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This is the nature of the grant. As I stated before, if it does comprehend, as it does in terms, *Portsmouth harbour*, (and it does so in consequence of the inquisition that was made; which inquisition greatly exceeded the commission, for that had expressly excluded them by directing that they should survey and view those parts which abutted upon the harbour, but no part of the harbour itself,) it is in that view also clearly void.

(a) See the original grant in Appendix.

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Let us next examine the common doctrine in the case of a grant made, and of which no advantage has been taken, and which has never been acted upon for a century and a half. It is most manifestly clear, either that the grant was never acted upon at all, or we must presume that it was surrendered, if ever the grantees did avail themselves of it. It has been argued thus: that supposing this was the case of a subject who had not acted upon such a grant for one hundred and forty years, the presumption must be the same as it was in the case of *The Mayor of Kingston-upon-Hull v. Horner* (a), and the case of the Advowson of *Chester-le-Street* (b). In those cases there was nothing produced but a grant made at a distant time. The Court said, time must determine the title. Wherever we see a length of possession of this kind, we must presume, from the lapse of time, that an adverse grant is surrendered. So where we find the King by his subjects still in possession of this soil, by the passing and repassing of such vessels as can pass and repass, we must conclude that if it ever existed in force this grant had been in the interim surrendered to the Crown. But it is much more probable, that when the grantees came to look at it, they were told that the King could not grant such creeks and ports, including the greatest port in the kingdom and one of the most important.


Upon all or any of these grounds, first, *the ex-*

(a) Cowp. 102.

(b) Ibid. 168 (in notis) sub nom. "*Powell v. Milbanke*."

*istence*

*istence of a nuisance; next, the illegality of any grant affecting the jus publicum* between high and low water mark; and next, *the great length of time*, and no fruit having come of this grant—a grant certainly, by the terms of it, expected to take effect immediately, and to be acted on by the grantees who were to go on progressively as well as they could; whereas nothing has been done:—upon all and every one of these grounds, it appears to the Court that this grant can be of no avail whatever.

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The consequence is, that there must be the same decree as was made in the case of *The Attorney-General v. Richards*, grounded upon the illegality of the grant itself:—and that this nuisance must be abated.

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\* \* This judgment was afterwards made the subject of appeal to the House of Lords, which forms the subject-matter of the next case of *Par-meter v. Sir Vicary Gibbs*.

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## IN THE HOUSE OF LORDS.

PARMETER and others . . . . . Appellants,  
and  
Sir VICARY GIBBS, Knight . . . Respondent,

1813.

February 13.

Affirmance by  
the House of  
Lords of the  
foregoing case.

Arguments on  
both sides in  
support of the  
several ques-  
tions made and  
points deter-  
mined.

Construction of  
Grants of the  
King.

Where a sub-  
ject claims a  
specific portion  
of land, the pro-  
perty of the  
Crown, under a  
grant by letters-  
patent, he must  
show a specific  
description of  
the particular  
place as meant  
to be conveyed  
by the instru-  
ment; for he  
cannot avail  
himself of ge-  
neral words.

A grant by  
the Crown held  
not to have con-  
veyed some por-  
tion of the sub-  
ject-matter

claimed under it with reference to the circumstances.

A question of title may be raised incidentally on an information to remove erections prejudi-  
cial to the *jus publicum*, or to abate a nuisance.

## IN RE PORTSMOUTH HARBOUR.

THIS was an appeal from the decree of the Court of Exchequer in the preceding case of *The Attorney-General v. Parmeter*, complaining that the Appellants were aggrieved thereby; and praying that it might be reversed.

The Appellants in their case stated that by letters-patent of his late Majesty, King *Charles*, the First, dated the 14th of *July*, in the fourth year of his reign, a grant was made to Dame *Mary Wandesford*, wife of Sir *George Wandesford*, then of *Gray's Inn*, Knight, and to *William Wandesford*, and their heirs and assigns for ever, of certain pieces of saltmarsh and oazey lands and grounds, that then, or then lately, were overflown by, or subject to the overflowing of the sea, particularly specified in such letters-patent; and also all and singular other his said Majesty's lands, commonly called the wastes of the sea, oazes, and oazey lands, saltmarshes, creeks, havens, lakes, inlets,

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inlets, fittey grounds, glibseys, neats, beaches, bolders, and sands, which then, or sometime were, overflown, or subject to the overflowing of the sea, situate, lying, being, and abutting on or near *Bewley Haven, Porchester Haven*, and the haven of the town of *Lymington, Hurst Castle*, the town of *Yarmouth, Thorley and Atham*, in the *Isle of Wight, Yarmouth Haven, Freshwater*, and *Newtonhook Point*; the haven or river of *Southampton, Millbrook, Redbridge, Eling, Hythe*, and *Fawley, Calshot, Bewley* and haven in the county of *Southampton*, or any of them; and all other his Majesty's lands, feedings, pastures, meadows, marshes, saltmarshes, and glibseys, wracks, and lands, which formerly or then were overflown, or subject to the overflowing of the sea, shores, coasts, gravel, and sands, with all the advantages of the sea, &c. in, upon, near, or about the towns of *Emsworth and Longston*, the island of *Hayling*, the marsh called *Drayton Marsh*, the town of *Wimering*, the island of *Portsea*, the castle and town of *Porchester, Portsmouth Haven, Fareham Haven*, the place called *Horford*, and other the places therein mentioned: and that his Majesty did, for himself, his heirs and successors, *give and grant to the aforesaid Mary Wandesford and William Wandesford, that they, their heirs and assigns, might, at their pleasure, freely and lawfully bank in, and retain banked, all and singular the premises thereby granted or mentioned, or intended so to be, as well against the sea as any other place, without the hurt, interruption, or denial of his said Majesty, his heirs and successors, or of any other person or persons,*

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persons, and erect and make any bank, sluice, or cut, or any of them, from time to time, upon the premises, or any part thereof, for the defence and better maintenance of the premises, and for letting forth and keeping out the sea from overflowing the same.

The case further stated, that the Appellants were jointly in the possession and occupation of a wharf, quay, or stage, and a dock, a bridge, a storehouse, a small building, used as an office or counting-house, and another small building, used as a pitch-house; all situate on the *Gosport* side of the harbour of *Portsmouth*, as absolute owners thereof in fee simple; which wharf, quay or stage, dock, bridge, storehouse, and other buildings, were made and erected in or about the year 1784, by, or at the expense of the Appellants, *Richard White* and *John Battershall*, and of *William Parmeter*, the elder, deceased, the late father of the other Appellant.

The Appellants insisted that the land on which those buildings and works were made and erected, were part of the land and premises comprised in the above letters-patent; and such land, and the fee simple and inheritance thereof, were purchased in the year 1784 by the Appellants, *Richard White* and *John Battershall*, and the late *William Parmeter* the elder, of *James Francis Perkins*, then of *Winkton*, in the county of *Southampton*, Esquire, and *John Compton*, then of *Harbridge*, in the same county, Esquire, at the price of 107*l.*; in consideration whereof, by indentures of lease  
and

and release, dated the 28th and 29th days of *September*, 1785, such land was conveyed by the said *James Francis Perkins* and *John Compton* to or in trust for the said purchasers in fee simple :

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That at the time of the execution of such indentures of lease and release, the same, with attested copies of the *several title deeds and writings* relating to the said piece of land, together with other parcels of land comprised in the said letters-patent, *were delivered to the Appellants, Richard White and John Battershall*, and the late *William Parmeter*, deceased; by which deeds and writings it appeared, as the fact is, that the said *James Francis Perkins* and *John Compton*, derived their title to the said piece of land from the said *Dame Mary Wandesford*, who survived the said *William Wandesford*; and such title was by the said deeds and writings regularly deduced and brought down from the said *Dame Mary Wandesford* to them, the said *James Francis Perkins* and *John Compton*; and *which indentures of lease and release, and copies of deeds and writings, are now in the possession or power of the Appellants* :

That from the time of making and erecting the before-mentioned buildings and works, until the death of *William Parmeter* the elder, he and the Appellants, *Richard White* and *John Battershall*, were, and ever since his death, such last-named Appellants, together with the other Appellant, have been in the quiet, undisturbed, and uninterrupted possession and enjoyment of such buildings

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ings and works, save by the institution of the suit hereinafter mentioned :

That previously to the building and making the dock before-mentioned, there was not, within the harbour of *Portsmouth*, or within many miles of such harbour, any dock, except a small floating dock, and there was not then in the said harbour, or within many miles of it, any dock, except that belonging to the Appellants, in which the ships or vessels of his Majesty's subjects, or any other private ships or vessels, could be repaired; and that such dock was, therefore, of the greatest utility, and of the highest importance to the public :

That besides the buildings and works before-mentioned, the Appellants were the owners of a stranded ship or vessel, lying upon the mudland, on the *Gosport* side of the harbour of *Portsmouth*, and near the north side of the before-mentioned wharf, quay, or stage; which ship or vessel had lain there *about 20 years*, but had not hitherto been used for any particular purpose; and in the year 1796 the Appellants, *Richard White* and *John Battershall*, together with the late *William Parmeter*, inclosed with wooden piles, driven into the mud or gravel, and secured by planks or pales, a small parcel of mudland, to the south-west of the town of *Gosport*, for the purpose of being used by them, and which is now used by the Appellants as and for a timber pound; which piece of mud-  
land

land was clearly a part of the land comprised in the above letters-patent.

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The case then set forth the proceedings in the Court below, with the substance of the information and the answers, and stated that until the building and making of the dock therein mentioned, there was not any dock in the harbour of *Portsmouth*, in which the ships or vessels of his Majesty's subjects, trading to or arriving at *Portsmouth*, could be repaired; and that they did not know or believe that the erections and works in question, or any of them, or any part of the same, were or was prejudicial to the harbour of *Portsmouth*, or incommoded the navigation in or of such harbour, or the passage or repassage of vessels therein, or the anchoring, mooring, or lying of such vessels in the said harbour; or that there was any danger that in process of time such erections and works, or any of them, or any part of the same, would in any degree destroy the harbour, or so far prejudice the same as to be attended with any of the consequences mentioned in the information; but on the contrary, they, the Defendants, had been informed by persons conversant in maritime affairs, and believed, that if all the mudlands on the *Gosport* side of the harbour of *Portsmouth*, from high to low water marks, in a right line fronting his Majesty's Dock Yard, on the *Portsmouth* side of such harbour, were embanked and excluded by such embankment from the sea, it would greatly tend to the improvement of the said harbour, and to the preservation

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servation of the navigation in or of such harbour : and they said, that their erections and works were erected and made by them or at their expense, in or about the year 1784, and that they had ever since been in the possession and enjoyment of the same without interruption, and that the land on which such erections and works were made, was purchased by them in the year 1784, and afterwards duly conveyed to them and their heirs in consideration of the sum of 107*l.* paid by them.

They stated, that previous to and until the making of their said erections and works, the sea, at spring tides, flowed and reflowed over the land on which such erections and works were made, and up to the shore or high water mark at *Gosport* ; but they said, that previous to the making those erections and works, or any of them, the sea never did, to their knowledge or belief, at neap-tides, flow or reflow over any part of the land on which such erections and works were made ; and the Defendants said, they did not know or believe that at any time previous to the making any of such erections and works, any ships of war, or any vessels, other than boats, did or could float over any part of the land on which those erections and works were made ; that their wharf, quay, or stage was raised and filled up with mud or soil, taken out of the harbour, and, therefore, the harbour, as the Defendants conceived, admitted, or was capable of containing, the same quantity of water as before the making such wharf, quay, or stage.

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That they did not know or believe that their said erections and works, or any of them, or any part of the same, in any degree obstructed the water from coming into or going out of the harbour of *Portsmouth*, on the flux or reflux of the tide, or in any degree prevented the scowering and cleansing the lower part of the channel of the harbour of or from the soilage there, or in any degree endangered the loss of such harbour, as a harbour for ships of war or vessels of great draught or burthen, or did gradually diminish the depth of water in the harbour, or on the *Gosport* shore, or that the said erections and works, or any of them, or any part of the same, were or was prejudicial to his Majesty's navy, or an injury to the port or harbour of *Portsmouth*, or a common nuisance, or an injury to any of his Majesty's subjects, in respect of any ships or vessels which might have occasion to pass and repass, and to anchor, moor, and lie within the said harbour; or that the said erections or works of the Defendants, or any of them, or any part of the same, prevented any quantity of water from flowing into the harbour, or in any degree diminished the body of water which returned upon the reflux of the tide, or in any manner choked up the harbour, or prejudiced the king's moorings in such harbour, or narrowed the harbour at high water, or lessened the depth of water in any part of the harbour, or lessened the flux or reflux of the tide, or annoyed or incommoded, in any manner, any ships or vessels, or boats in passing and repassing into or out of the harbour, or moving from one part of the same to another part thereof, or mooring or lying within  
the



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the same; or that such erections or works, or any of them, or any part of the same, would produce any injury or inconvenience to the said harbour, or to any ships or vessels using the same.

That the letters-patent, mentioned in the pleadings, were sufficiently comprehensive to include and comprise the land on which the said erections and works of the Defendants were made; and the Defendants said, they did not know or believe that such letters-patent had ever been, in any manner, abandoned; and they insisted that the same were not void, and that they were of sufficient force and effect to pass the soil on which the said erections and works were made or any land or ground between the high and low water marks, which were comprehended in such letters-patent; and they said, that they, the Defendants, purchased the land, on which the buildings and erections were made, in the year 1784, from *James Francis Perkins* and *John Compton*, in such answer described, and that from what appeared by the title deeds and writings relating to such land, they, the Defendants, believed, that the title of the said *James Francis Perkins* and *John Compton* was derived from the said Dame *Mary Wandesford*; and the Defendants, in their said answer, claimed the benefit of the act of parliament made and passed in the 9th year of the reign of his present Majesty, entitled, “An Act to amend and render more effectual an Act made in the 21st year of the reign of King *James* the First,

First, entitled, ‘ An Act for the general Quiet of the Subject against all pretences of concealments whatsoever.’ ”

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The case further stated, that many witnesses were examined on both sides—that on the part of the Crown some witnesses deposed, that, in their opinion, and as they believed, the land on which the erections and works in question (other than the timber pound) were erected and placed, was not comprehended in the letters-patent in express terms, or by clear description; but it was admitted that the land on which the timber pound had been formed was within the terms of the grant made by such letters-patent: and some of the witnesses for the Crown also deposed, that no actual possession had been taken of any part of such land previously to the year 1784. But as the information sought the interposition of the Court upon the sole ground of the erections and works being *a public nuisance*, the evidence, in general, appeared to be directed to the establishment of that fact; and which was, undoubtedly, considered the material fact in issue in the cause, although the question of title was incidentally introduced into the information, and was, therefore, as it must be acknowledged in strictness, also put in issue:—That upon the question of nuisance the evidence on both sides was extremely long: on the part of the Crown several witnesses deposed, that, in their judgment and opinion, the erections were a nuisance; but many of them considered it as of a very trifling nature, and to a very small extent, and

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and very remote in its effect, if of any effect at all; and one of such witnesses, a gentleman of considerable repute as a civil engineer, deposed, that in his apprehension, the erections and works in question had (though in a small degree) been of service to the harbour, and to the navigation of it; and in support of which opinion he assigned various reasons. On the part of the defendants a great number of witnesses, consisting of civil engineers, pilots, and other persons of skill and experience, and who were well acquainted with the harbour and the navigation of it, were examined; and they deposed that the erections and works complained of were not, for any of the reasons stated in the information or otherwise, a nuisance, or in any degree injurious to the harbour, or to the moorings of his Majesty's ships; and, on the contrary, many of such witnesses were of opinion that the erections and works were beneficial to the harbour; and in support of that opinion they assigned their reasons with great particularity:—that it was also clearly proved, on the part of the Defendants, that previous to the erections and works being made, no ships or vessels, other than small boats, at high water, and in spring tides, could float over any part of the land on which such erections and works were made; and the Appellants humbly insisted that it could not be effectually disputed that the weight of evidence upon this part of the case was considerably in favour of the Defendants:—that it was likewise proved, on behalf of  
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the Defendants, that before the dock in question was made or formed, there was no other than a floating dock in the harbour of *Portsmouth*, on which the ships or vessels of any of his Majesty's subjects could be repaired.

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They then stated that the cause was first argued principally upon the question of nuisance, upon which the Court did not deliver any opinion; but on the 16th day of *May*, 1811, ordered that it should be re-argued by one counsel on each side, on the 17th day of *June* following, as to the validity and effect of the letters-patent; that the cause accordingly came on to be re-argued on the last-mentioned day, and on the 23d day of *December*, 1811, the Court, by its decree, was pleased to declare that the right to the soil in the pleadings mentioned then was in his Majesty, and thereupon to decree that the wharf, quay or stage, docks, bridge, storehouse, timber pound, and other erections and works erected and made by the Defendants on the piece of ground within the harbour of *Portsmouth*, between high and low water marks, should be abated and removed: and that the Appellants, or some of them, should forthwith, at their own expense, pull down and remove the same, and should be restrained by the injunction of the Court from making, setting up, or erecting any other erections, buildings, or works on the soil in the pleadings mentioned.

They finally stated that this judgment of the Court, as the Appellants understood, was formed  
without

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without any regard whatever to the question of nuisance, the only ground upon which any relief was sought by the information, but upon one of these two grounds, viz. either that the grant was against the *jus publicum*, and therefore, or for some other reason, void, or that the land claimed by the Appellants, and upon which their erections were made, was not comprised in such grant: and they submitted that the decree, as they were advised, was erroneous, and ought to be reversed, for the following (among other) reasons:

1. It is admitted that the sea and sea coasts round the kingdom, so far as the sea flows and reflows between the high and low water marks, are the property of the Crown, and may be granted and transferred, subject to the *jus publicum*; and although there may be found in the grant in question some words importing an intention to pass what the Crown could not by law transfer; yet it is humbly conceived that the whole of the grant is not therefore void, but that as to the soil between the high and low water marks, of which description the land in the possession of the Appellants undoubtedly is, such grant is valid and effectual. And if it were good in its origin, the Appellants are advised that it cannot become void by any use that may afterwards be made by the subject of the property comprised in it; although, as the Appellants are ready to admit, if any nuisance be erected or placed upon the soil granted, such nuisance might and ought to be abated—the *jus publicum* still remaining

remaining in or under the protection of the Crown, notwithstanding the grant.

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2. Because the information was not filed to recover the land itself, but solely for the purpose of abating and preventing in future what was alleged, but as the Appellants humbly insist by no means proved, to be a public nuisance: and although the title of the Appellants to the land was incidentally introduced and denied, yet it is obvious, that the suit was not instituted for the purpose of calling upon the Court to decide the question of title, nor was any such decision asked, it being insisted on the part of the Attorney-General, that whether the Appellants had a right to the soil or not, the relief prayed ought to be granted; for that any title to the soil could not justify the erection upon it of a public nuisance. And with regard to the case of the *Attorney-General v. Richards* (2 Anst. 603), by which it was insisted in argument, that the decision of the present case ought to be determined, it is to be observed, that the evidence there was wholly in favour of the Crown, *no witnesses having been examined on the part of the Defendants*, and it being clearly proved that the erections there complained of were a public nuisance, and the Defendants not attempting to show any title to the soil. It is, therefore, conceived that the two cases bear little or no analogy to each other. It was argued on the part of the Crown, and which argument appeared to have great weight with the Court, that the letters-patent, if originally good, had been


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been since abandoned, that no possession had been taken under them previously to the year 1784, that no part of the rent reserved to the Crown had been ever paid, and that therefore a surrender or reconveyance to the Crown ought now to be presumed: but it was insisted, on the part of the Appellants, as they now humbly contend, that the evidence in the cause did not authorize any such presumption. With regard to the land in question, although no actual possession had been taken of it before the year 1784, yet it is conceived that the Appellants having shown that such land was, shortly after the date of the letters-patent, conveyed by Dame *Mary Wandesford*, the surviving grantee, and afterwards from time to time by the different persons claiming to be the owners of it, down to the time the actual possession was taken: they, the Appellants, thereby established a constructive possession from the time of the grant, and satisfactorily answered the supposed presumptions of abandonment and surrender to the Crown; such continued and invariable acts of ownership being wholly inconsistent with either of those presumptions. And as to the other parts of the extensive property comprised in the letters-patent, consisting of several thousand acres of land, and having now various buildings on many parts of such land of very considerable value, the information did not put in issue any of the facts from which the above arguments were drawn—it did not state that such other property had not been taken possession of—that the rent reserved

to

to the Crown in respect of the whole had not been duly paid by the owners of those parts—or that there was any ground or reason to presume an abandonment or surrender by such owners, or any of them: the Appellants, therefore, had no opportunity or right to enter into any proof with reference to such facts.

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3. Because the several persons, owners of the other parts of the property comprised in the grant, are not parties to the present suit; but who, as the Appellants are advised, were and are entitled to be heard upon any question respecting the validity of such grant.

4. Because the grant being under the great seal, cannot, as the Appellants are advised, be repealed but in a suit of *sci. fa.* instituted for the purpose. With regard to the other ground upon which, as it was understood, the judgment of the Court was formed, viz. that the land in the possession of the Appellants was not within the grant, it is humbly conceived, that the evidence in the cause, if it did not clearly establish the contrary fact, did not support the conclusion which the Court appears to have drawn. On the part of the Defendants it was shown, that a moiety of the land in question was conveyed by Dame *Mary Wandesford*, the surviving grantee, by indenture of feoffment, dated the 11th day of *May*, 1674, as part of the property comprised in the letters-patent, and in which indenture such letters-patent were recited; and it was therein also recited, that the other



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moiety had been previously sold and conveyed to *Margaret Wandesford*, the sister of the said Dame *Mary Wandesford*; and the title of the Defendants to the entirety was regularly deduced from the said Dame *Mary*, through this indenture of feoffment and the conveyance to *Margaret Wandesford*; and the witnesses who were examined on behalf of the Crown on this subject, and who were unacquainted with the deeds and instruments constituting the Defendants' title, did not go further than to depose, that in their opinion and belief, such land was not within the grant. It is, therefore, humbly insisted, that if by the form of the information this question was properly brought before the Court, yet that a different conclusion ought to have been drawn from the evidence; or, at least, that the fact ought to have been tried and determined by a jury.

Argument for  
the Appellants.

On the part of the Respondents it was insisted by their case that the judgment and decree of the Court of Exchequer ought to be affirmed, for the following (amongst other) reasons:—

1. Because the letters-patent under which the Appellants derive their title were absolutely void *ab initio*, and of no effect.

2. Because, admitting the said letters-patent to have been originally good and valid in law, the same have been abandoned.

3. Because the said wharf, quay or stage, dock,  
bridge,

bridge, store-house, counting-house, pitch-house, timber-pound, and other buildings, are not, nor is any part thereof *locally* within any of the premises granted by the said letters-patent.

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4. Because all the erections, buildings, and premises in question are a public nuisance; and are prejudicial to the harbour of *Portsmouth*, and tend to lessen the depth of water in the said harbour, and to destroy the same.

*Hart and Johnson*, for the Appellants, submitted that their case consisted of three distinct independent points or propositions, arising on the questions that had been raised by the Crown, which they now put somewhat differently and more fully than in the argument below.

First, Whether the letters-patent were void at their inception, or not valid at the time when they were first made and issued—the question which had given rise to the second hearing in the Court of Exchequer.

1st question.  
 The validity of  
 the letters-  
 patent ab initio.

Secondly, Assuming that the instrument was at that time in point of law a competent deed to effect a grant of the soil and property in question, whether subsequently to that grant and during the interval between its date and the filing of the present information, any thing had occurred, as whether the grantees had been guilty of any thing that might be brought under the denomination of laches, or of derelinquency amounting to an abandonment,

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 abandoned or  
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donment, or in consequence of any thing in the conduct of the grantees, the persons whose claim was now under discussion, and whose right was sought to be affected by this proceeding, had forfeited the protection of the charter, or was precluded from availing himself of that foundation-stone of his title at the present moment.

3. Whether the facts establish a case of public nuisance derogatory to the grant.

Lastly, Whether (a point arising out of the facts of the case as proved in evidence) the use to which the Appellants had applied the subject-matter of the grant was such as derogated from that paramount right which in law was always considered as reserved to his Majesty in all similar grants, or to the public in all grants of public property; in other words, whether such an use derogated from the obligations to the King and his subjects, under which the grantee must hold; and that would depend on the question whether the use of it caused a detriment or hindrance to individuals in the exercise of a public right to pass and repass over the soil so built on, so as to make the buildings, &c. thereon an obstruction to such right, and consequently a public mischief or nuisance.

On the first point, the validity of the grant itself, they put the question in two ways; first, whether the subject-matter of the grant was a matter capable of being granted out to a subject by the Crown: and, secondly, whether the place in question—the scite of the erections objected to—had been in fact included by the grant with reference to the terms of the instrument and the places

places described therein, as being granted to the grantees; and whether they ought or ought not to be abated on that ground of objection to the title of the Appellants.

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They urged the affirmative of both those propositions; and in support of the first they submitted that the place in question was a spot situate between what is called the low-water mark and the ordinary high-water mark on the margin of the sea, and part of the harbour of *Portsmouth*,—that it was *primâ facie* the property of the Crown, and vested in his Majesty as private property, but subject to certain incidental public rights therein, whether it be in the possession of the Crown or of the subject,—and that it is competent to the Crown to grant the property in question, and that it is capable of being held and enjoyed by the subject as his private property.

On that point they referred to Lord *Hale's* Treatises, *De Juris Maris* and *De Portibus Maris*, as laying down very distinctly that such property is a subject capable of being granted by the Crown to an individual, and that that individual may enjoy it as private property, and that the title to it may be established either by grant or by prescription. (a)

[The *Lord Chancellor* inquired what part of the letters-patent has described the Appellant's land, because the *first* difficulty is, said his Lordship,

Quere, of the validity of a grant in general terms.

(a) Treat. de Jure Maris, part i. ch. 6, p. 26, 32; ch. 7, p. 43. De Portibus Maris; ch. 4 and 6.

whether


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whether it be possible, in point of law, that a grant of the Crown, *in these general terms*, can be good.]

It was submitted that in many cases the subject-matter of property may pass by words very general, and even in grants of the Crown, provided those general words are as connected with the body of the grant intended to pass a particular subject, that although, in the consideration of instruments of this sort, a rule of law most beneficially prevails, creating a distinction between the grants of the Crown and the grants of a subject, that the grant is to be taken as between subject and subject as against the grantor, whilst the grant of the Crown must be construed, on the contrary, favourably to the interest of the Crown, the grantor; yet that principle of law is accompanied with another, that when the Court expounds the grant most favourably for the Crown, it at the same time always expounds it liberally and for the Crown's honour, in order that it may pass to the subject that which it was the clear intention of the Crown to give, and which the Courts of law would say should be given, by the grant itself. Supposing, therefore, the Appellants should fail in pointing out in the instrument on which they rely specific lines of boundary, there is yet sufficient for their case in the words which occur towards the end of the grant itself. After defining by certain limits the quantities and situations of the places granted—after specifying that those amount to 5189 acres, the grant proceeds further

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further to state, that the Crown “ had given and granted by these presents, and for the considerations aforesaid did grant to the aforesaid *Mary Wandsford* and *William Wandsford* all and singular those our other lands commonly called sea wastes of the sea *oazes*, *oazey grounds*, salt marshes, creeks, havens, inlets, *fittie grounds*, *glibsey neats*, beaches, bolders and sands, which formerly were and now are overflown, or subject to the overflowing of the sea, situate, lying, being and abutting on or near the port called *Bewley Haven* :” and then proceeds to describe a number of particular places, of which places these *oazey grounds*, beaches and grounds, by other denominations, situate in these particular places, “ and all the lands and feedings and shores that now are or were subject to be overflown, called *Drayton Marsh*, the town of *Wymering*, the island of *Portsea*, the castle and town of *Portchester* aforesaid, *Portsmouth Haven*, *Fareham Haven*, the place called *Horford*, the bridge called *Wallington Bridge*, the aforesaid town of *Gosport*, and other places therein described,” and then concludes, after describing the other places in *Portsmouth Haven* and the town of *Gosport*, “ and whatsoever is mentioned or specified in these presents by other metes and bounds, or elsewhere in our county of *Southampton*, before granted or mentioned, or intended to be granted by these presents.”

Thus the letters-patent having included amongst all the aforesaid towns, all and singular the houses, edifices, buildings, marsh lands, lands recovered  
 and

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and forsaken by the sea-shores, creeks, and lands that are overflown or subject to the overflowing of the sea-shores, creeks, forts, havens, inlets, banks, oaze or oazey grounds, glibses, sands, and the other premises mentioned and described, it was urged that it was not for the House to consider, for the purpose of deciding the present question, whether this grant was or was not in itself more extensive than in ordinary prudence the Crown ought to have made such a grant; the question at present being merely the description of locality, the deficiency and insufficiency of which was used as an argument; and in the judgment below much stress was laid on the position that it was so extensive as that it ought not to prevail, for that taking these comprehensive words, which include all the shores, the Crown would be supposed to grant the whole sea-coast of *Southampton*, extending from *Dorset* to *Sussex*; and it was said that if the Crown had thought fit to make such a grant, the fitness of the grant being questioned, it would but little avail. Still on a question of locality, that is, on the simple point of fact, whether there was sufficient description of locality of the spot to which the information points, and the grant attaches, it is enough to show that the spot is part of the haven of *Portsmouth*, and it is upon that principle the information itself proceeds; and if it be quite clear that it is a spot forming part of the shore of the town of *Gosport*, comprised within the haven of *Portsmouth*, its locality is sufficiently described in the grant to pass the property. Consequently it does, in fact, embrace  
in

in direct terms the line of metes and boundaries pointed out by the patent itself.

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[Lord *Redesdale* inquired what was the mete and boundary towards the sea? Towards the sea shore (observed his Lordship) is clear enough, it is the whole coast between *Sussex* and *Dorset*; but what is the boundary towards the sea?]

The sea boundary was submitted to be the low-water mark, and the letters-patent granting the shores would raise a question of construction, what the law of the country considers to be the shore of any particular situation. In common parlance, it is plain what the word *shore* means; but if by a high and great authority, a technical meaning is given to that expression, it must be considered that the Crown would use it in the legal sense.

[Lord *Redesdale*. Did these letters-patent grant all the land between high and low water mark, from the county of *Sussex* to the county of *Dorset*, excluding every individual from access to their lands, from the sea as well as the public, supposing their enjoyment to have been equal in extent to the granting of the letters-patent?]

It was said in answer, that it was not meant to contend that this grant is to be taken to exclude the public rights on these shores; but that whatever might be the terms of the grant, dedicating this to the private use of an individual, instead of leaving it the *jus privatum* of the  
 Crown,



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Crown, still it must be subject to all such public use as the Crown itself held it subject to.

[Lord *Redesdale*. Do you advert to the *purpose* of the letters-patent, that these boundaries should be secured from the overflowings of the sea? The Crown proposes to grant lands to be secured from such overflowings of the sea, and the consequence of being so secured would be, that no individual could have a right of passage over them in vessels of any description.]

That, it was submitted, would form the second part of the case; for the present it was only meant to establish the first point, that this grant of the shore was a grant of the specific spot in question, and comprised the space of land between high and low water mark, because the word *shore* has by great legal authority received a technical legal construction, meaning all that space of land alternately left and covered by the sea from the ordinary high-water mark to the ordinary low-water mark.

[Lord *Redesdale*. I apprehend what you are now contending for is this, that the grant comprises the whole between high and low water mark, and that you are not bound to contend that a grant of the whole shore, from the coast of *Sussex* to the coast of *Dorset*, would be a valid grant, but that you have a right to elect which part of the shore you think fit, in order to give it validity.]

It

It was answered, that it was meant to be contended, that in law it might be a valid grant of the whole shore; but that the use of it must be qualified by the same legal obligations under which the Crown is supposed to hold and use the premises in question; that though to contend that the whole shore of the whole county might competently be granted by *general words*, would be a proposition too extravagant, and not capable of being supported, it is competent to the Crown, and that it would be considered in law as originally competent to the Crown, to grant the whole of the shore of the county by specific terms; for it is conceded that the whole of the shore belongs to the Crown as private property, subject to public uses. Lord *Hale*, in his Treatise *De Portibus Maris*, part ii, c. 4, 5, p. 67, sets out with treating this as the *jus privatum* of the Crown, subject to the *jus publicum*,—and that it may be granted by the Crown and held by the subject: and he states that the Crown has frequently so granted portions of that ground, although the use the party would be entitled to make of the property when the grant issued, is a question distinct from the present point. He goes on to state, the whole being *prima facie* in the Crown, the Crown's grant may give to an individual subject, and that many parts of it, even to the extent of harbours and havens, are held by prescription by private individuals; and in one case to which he refers, that of the Countess of *Devon*, p. 55, where there was a question arising before the Court on a title to the haven of *Toppesham*, it was

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was decided that the Earls of *Devon* held the coast in question by prescription; and Lord *Hale* lays down and shows distinctly, that there is enjoyment of a great portion of the sea coast of the kingdom by private individuals.

It was, therefore, confidently contended, that although this might be a very large grant for the Crown to make, that it might be, perhaps, a larger grant than the merits of the individual grantee warranted, but it could in point of law make no difference whether the Crown, in exercising the power, divided the subject-matter of the grant among five hundred different persons, or gave it to a single individual, provided it was consistent with such a right as the Crown possessed, even though it might include the whole tract of country from the borders of the county of *Sussex* to the commencement of the county of *Dorset*, as in the case in *Hale* of the grant of the castle of *Trematon*, which annexed *Plymouth* port to the Duchy of *Cornwall*, or other princely grants, with their regalia, which have been made to different subjects. Therefore the validity of the grant, as to any given spot, does not depend upon the question of specific mention of the particular spot where the grantee may be entitled to gain a much more extensive dominion over the land in question. That will resolve itself into a question whether the grantee can select any given spot of the subject granted, to abstract, without private or public detriment, that spot from public use,  
and

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and apply it generally or distinctly to his own exclusive advantage.

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The grant of the Crown, it was admitted, must be undoubtedly subject in law to this qualification, that although the Crown undertook to grant the whole, yet inasmuch as it must now be considered that many portions of this must by antecedent grant actually existing, or by prescription, have been granted to other individuals, the person who comes last must be careful that he does not, in attempting to avail himself of that grant, commit a trespass by infringing on the possession of other individuals to other portions of that same grant. Wherever a lord of a manor's estate goes to the margin of the sea, though there is no express grant, he is entitled to the shore of the sea, that is, the limit from the ordinary high-water mark to the low-water mark; and wherever he is entitled to the profits arising from that description of property, the tenure of his manor is attended with incidents which do not by law naturally belong to a manor, the law presuming that that right of possession of the shore originated in a special grant by the Crown, inasmuch as it has been enjoyed from time immemorial, and is incident and appurtenant to the manor; but in the attempts of this grantee to avail himself of what the Crown intended to give him, if he should find the title was in another subject by prescription, it would behove him to abstain from interfering with that prior title, but that would not disable the grantee from having in law, if it were

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competently conveyed in the grant, other portions of the same grant on which an anterior title could attach : and, therefore, on this subject, confining the observation to this part of the case, that if the spot in question be a part of the shore within the limits described by the language, and there be not the intervention of any lord who by prescription annexing to his manor this regalia, which would presume a grant from the Crown of that portion of the sea shore, the grantee might avail himself of the grant to take possession of it within reasonable time, and enjoy it as grantee, although he may be disabled from enjoying other large portions of the same grant.

Certainty of  
thing granted.

Then admitting the fact, that the spot does lie on the shore of the town of *Gosport*, part of the haven or port of *Portsmouth*, here is still a competent grant of it, for these terms would be sufficient to pass it according to the construction which the courts of law have adopted in respect of the grants of the Crown. In *Whistler's* case the question arose on a quare impedit on a title arising on letters-patent. In that case, " It was resolved by the Court, that when the king's charter in general terms refers to a certainty, it contains an express mention as if the certainty had been expressed in the same charter, although the certainty to which the reference is be not of record, but lies in averment by matter in pais or in fact. And, first, it was considered what the law was in this case before the Statute de Prerogativa Regis." It is the principle that if his Majesty

Majesty has, in point of fact, described the thing certainly, and the spot in question is part of the land described, and within these denominations of boundaries, and is part of this local description, it is sufficient to all the purposes for which the king's courts require certainty in his grants, namely, for the purposes of its being assured to the advisers of the Crown, as well as to his Majesty, that he knew what he intended to grant, and that he has expressed competently in the instrument the object he meant to grant.

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Independently of that, it was urged, that taking the whole evidence together, though it must be admitted there is great reason to presume that the scite in question is not one of the limits prescribed within the boundary marked out by the anterior part of the grant, yet it is clear that a portion of these buildings is within the limits of the grant. If it is said, in arguing this case on the part of the Attorney-General, that trusting to the parol evidence which was read, they make it clearly certain that the scite of the wharf, and the other buildings, is not within the described limits of the grant, yet it must be admitted that the timber pound is within the limits; but supposing that the evidence which consisted but of the production of the letters-patent themselves, of a chart that had been drawn and made under the direction of those who sustained this information, and of the parol testimony of some gentlemen, witnesses undoubtedly highly respectable, some of whom described, that of their own knowledge the  
 chart

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chart was taken consistently, and was a due representation of the face of the country; and others not taking on themselves to know the country, but assuming the chart to be correctly described that this spot did not come within the limits of the grant, taking that to be certain, the Appellants in this case ought not to be bound by that which certainly, though it brings greatly into dispute their case, is ex-parte evidence. If the Court below had a doubt with regard to the locality, and had considered the particular delineation and the line of description in the letters-patent as that by which the spot would or would not pass; if the Court, not giving to the evidence on one side conclusive credit, had directed some further or other mode of investigation, in which each party might be an actor, to elicit the truth from the witnesses, or perhaps to impress the truth upon the knowledge of the witnesses; if the Court had directed inquiries of that sort, then the chart produced in evidence would be a document having full and conclusive authority as evidencing the fact to which it was applied, but that was not the case. The informants, with a view to make as strong a case as they could, to prove that the boundaries being such and such, the conclusion was, that the buildings were not parcel of the grant; still it was ex-parte and not binding on a Defendant, who thinks if he had been allowed to have concurred in the delineation of the face of the country, and had had men of equal skill and integrity, he might have found means of satisfying these engineers who speak of it, that the scite of the  
build-

buildings in question was parcel of the grant, or at least so connected with the grant as that it must inevitably pass as parcel of the subject-matter, according to the terms of the letters-patent, containing the words read, and according to the principles which, in Lord Coke's Reports, he has stated to be the principles upon which Courts of law would expound the King's grant. Therefore it was insisted, that even upon the scite of the timber pound, that would be sufficient to have entitled the Defendants to an issue to inquire whether or not the buildings were parcel of the grant, unless the Court could be satisfied that the grant is nugatory. The Defendant's witnesses (they observed) speak to the situation of the place in question being de facto parcel of the grant, and therefore they were entitled to some other mode of inquiry with respect to that fact—whether that mode of inquiry would have been most properly exercised by the Court referring it to a jury to find the fact on an issue—or whether the Court would have directed a commission to take the depositions of the witnesses upon oath—that was not for the Appellants to suggest; but with respect to the timber pound, that, they insisted, must be taken to be within the grant.

They therefore concluded that the Court below did not found their decision upon the principle of being satisfactorily informed that any part of the premises were without the grant; for if that were the case, it would be doing injustice to the Court to lay down a proposition of this description, that

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being satisfied that the greater part was not within the specification of the grant, that it would deprive the subject of the possession of that which was within the description of the grant. So that if the Court had not seen some other ground upon which it could invalidate the grant, it would have directed an inquiry. The Court of Exchequer, therefore, must be taken to have considered that the subject was capable of grant.

[*Lord Chancellor.* Had you any argument whether the inquisition was not void by the terms of it? The jury do not *find that it will not be* to the damage of the king's subjects, but *that it is reported* it will not be.

Lord REDESDALE.—“ That the acquiring and obtaining the aforesaid lands from the overflowing or surrounding of the sea, *as it is reported*, will not be any prejudice or damage to any person or persons, and that the acquiring and obtaining of the aforesaid lands from the overflowing and surrounding with the sea, *as it is said*, are, and for the future will be, for the great advantage, benefit, and profit of the several parts of the county aforesaid respectively adjoining.”]

2d point, Whether lost by misconduct.

On the second point it was insisted, that, assuming the grant to be good at the time when it issued under the great seal, nothing had been done which amounts to an abandonment, or which disables the grantee from taking the benefit

fit of the grant. It was submitted, that if the Crown had made a grant of a specific proportion of land for a particular object to be effected by the grantee, and that grantee had been guilty of laches or delay, in availing himself of the benefit of the grant, by applying it usefully for those purposes for which the Crown was induced to make the grant, it would be competent to those claiming under him to insist on it, but that the Crown might avoid it; still it was contended such laches do not amount in the first place to a presumption of surrender. That would first introduce the question of what is the meaning of a surrender in the courts of law, according to the present habit of raising legal presumptions. The *Hull* case, which was decided not very remotely, and other cases which have travelled in the steps of that case, the Courts of law have gone to a considerable extent in presuming grants against the existence of records, when every man must have known he could not have sworn to any such grant; and the Courts have done it as a maxim of law most beneficial to the subjects at large. In one case recently, in *East's Reports*, they went to the extent to presume on facts of enfranchisement of lands from the Crown, where all the documents must have been documents of record, and therefore where no grant could take place without its being recorded, and where the rolls were perfect with regard to other enfranchisements, and therefore no grant could have taken place without its being on the rolls of the manor; but it was on

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the idea that a claimant, after great length of possession, should not be ousted on the ground of ancient title, which could only be displaced by enfranchisement, and the Court always decide in favour of possession; but if presumption could be raised to oust a person who has been long in possession, that presumption would be most mischievously applied. If the Appellants have *de facto* and *bona fide* taken possession of the property under the grant, and expended large sums of money, have embarked that which is to constitute the provision and maintenance of himself and family, and continued undisturbed, and been permitted to rest in the confidence that they were doing right for nineteen years, there is no principle of law on which any Court will presume a surrender of the grant.

Then—supposing the presumption of surrender to be out of the question, and that the grant in question was made for certain purposes intended to be beneficial to the Crown, and that the Crown has not received the corresponding benefit, and, therefore, that a delay of one hundred and fifty years ought to be considered as a ground on which the grant should be destroyed;—they submitted, upon that point, that before the principle can be established, it ought to be clearly made out that the grant has not been acted upon in the way that the Crown had a right to look for; for it cannot be said, after inspecting the vast tract of country which is granted, the amelioration of which would produce public benefit

nefit and individual profit to the Crown; that still, because in respect of a small spot the grant has never been acted upon, until some individual, by an observation perhaps of peculiar ingenuity, has thought it capable of being turned to more beneficial purpose; the whole grant is therefore to be considered as abandoned, and that the Crown has been deprived of the benefits it had a right to expect from the possession; whilst on the other parts of this property great portions of land have been embanked, and the defendants have been glad, as fast as the necessity of the country would enable them to do so by building and embankment, to render the estate of value to themselves and to the Crown.

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[Lord *Redesdale* inquired, “Has any part of the grant been in possession of the grantees?—According to my knowledge a great deal of it has not.—You are to pay fourpence an acre to the Crown,—Is there now any such rent paid?”]

On that point they submitted that that would not advise the grant unless the Crown should take *the ordinary course of resuming the grant*, and they referred to Lord *Hale's Treatise De Jure Maris*, and the Reports of *Levintz*, a contention between the lessees of Lady *Wandsworth* and *Stevens*, in which she made certain demands against them as her lessees, founding a title under the grant in question, the only information of the fact of possession at present accessible, except a bill which they had found in this Court.

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As to the  
ground of non-  
user of the sub-  
ject-matter of  
the grant.

The next question made was, whether the last ground on which the Attorney-General, or the advisers of the Crown, were said, in making up this report, to have built their chief strength, does prove a non-user of the *locus in quo*; for they say that if the Appellants are entitled to it they ought not to be permitted so to enjoy it as they had done before. Upon that it was urged, that the king could grant it only subject to the public use, the grantee was therefore bound to use it in such a way as to keep himself clear of two objections: the first, that he should not impede any of those general public rights which the subject has in himself in this description of land, as the soil owner of the territory of the king; where there is no special occupant this description of land is in the king. The next point is to satisfy the Court that it does not produce a public injury to the public rights, which the Crown is bound to protect: the first misuser of the land would consequently arise from obstructing the subject from having that free transit over the water, to pass and repass for the purposes of commerce or personal convenience or pleasure, and for the purpose of getting to the land from that water, of which the shore is supposed to be the middle term.

They submitted it was not competent to the subject so to embank any portion of this land, the non-embankment of which could be shown to be for the use of a subject having a right to disembark on the shore. That right of the subject, they insisted, was not so unqualified as it was  
stated

stated by the Crown on the original argument to be. It is not a capricious right of the subject to land when and where he pleases. It was stated as one of the grounds of the Crown's title, that this was so exclusively the property of the Crown, that where the sea has retreated it was so far the private right of the Crown that no person could go over it without committing a trespass; but it cannot be insisted the right of the subject is so universal and unqualified, it must be a right accompanied with the use and purpose for which it was to be exercised; it is not for a subject to say because he has a private convenience to this, that if there be ten miles in extent of shore where he can disembark himself from the water that he will so capriciously insist upon this right as to say he will reserve the right of selecting this piece of land for his purpose, and therefore that it shall not be embanked. That would go to make the anterior principle a nullity, if it be admitted that the Crown has a right to grant the shore, provided the use made of the grant shall not obstruct the purposes of the subject in landing when he is disposed so to do, and that the right of the subject precludes all embankment. The principle that the Crown has a right to make the grant becomes a mere nullity—it is a mere dead letter; and if he has the first without the grant, then the consequence would be he takes a grant useless to himself, because he burthens himself with an obligation when he acquires no benefit by it.

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On this part of the case they referred to the  
case


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case of *The Attorney-General v. Richards*, which was cited and relied on as a decisive and conclusive authority in the Court below. Now, according to the facts, they submitted that it did not apply to the present, and was wholly distinguishable in its circumstances. In that case it was proved most incontestibly that the persons who had excluded the flowing of the water from that part of the margin of the land had obstructed a useful and constantly used landing place of the town of *Gosport*; that they had therefore excluded the subject from that which the Crown could not exclude him from; they had used it for a purpose not competent to the Crown to apply it. Persons had been in the constant habit of landing there to go into the town of *Gosport*, and the consequence was there that the Court decreed that the nuisance should be abated, for a nuisance it was. In this case the place in question is a place not capable of being usefully applied to the purposes of landing, but a spot lying on one side, either to be applied to some such purpose as the present, or incapable of being applied to any purpose: that is a marked distinction between the two cases: for in the present there is not a shadow of evidence that by the building remaining any subject has been prevented from landing on any part of the shore where it was possible for him to land, or that any access was prevented either to an individual disposed to go there, or to people having property not being able to get at it by reason of obstruction from these buildings.

[The

[*The Attorney General.* There is no part of the case, no part of the evidence is directed to show that these buildings are injurious to the landing, the injury is to the king's moorings in the harbour of *Portsmouth.*]

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On the last point the counsel for the Appellants submitted, that the question raised by the charge in the information, that the buildings and erections complained of were prejudicial to the harbour, and a nuisance to the public right of navigation in the port, was wholly a question of fact to be determined by the evidence in the case, or by an issue at law.

3d question of  
 nuisance, ques-  
 tion of fact.

They urged at great length (from the testimony furnished by the depositions read in evidence on the hearing), that there was in fact no nuisance arising from the erections constructed by the Appellants, and they instanced similar buildings erected by the Crown in corresponding parts of the harbour, to show that such buildings could not have been considered to be detrimental to the harbour by the agents of the Crown, who had advised, and planned, and built them.

Upon these grounds they contended that the determination and judgment of the Court below could not be supported, and must be reversed.

*Lord REDESDALE.*—It is very important that the letters-patent grant 5189 acres, as described in the maps or tables referred to in the inquisition; they



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they do not grant by metes and boundaries, but they grant 5189 acres described in the maps or plans. That grant might be made not void for uncertainty if these maps or plans could be produced, but if they are not producible how is it possible to ascertain what are the specific 5189 acres? The grant is of certain quantities of land, abutting on one side in a certain way; but what is the extent from that point to the sea can only appear from those maps or surveys. The objection is, that they are void, and void they may be for want of certainty; they do not contain sufficient certainty, they refer to that which would create it, and referring to that which would create certainty, if that could be produced, it would be sufficient.

You show no specific possession from the date of the letters-patent, if you did it would be presumed it was within the map or survey, but you show no possession from 1639 to 1784; on the contrary the evidence is, that the public, or the Crown for the public, was in possession.

*Lord ELDON.*—The information states an objection to give title in two ways; it first states that the letters-patent are void; another is, that previous to 1784, when these erections were made, neither you nor any one else had been in possession. To be sure it may be argued, that where the Crown makes a grant of this sort, supposing the grant good, possession of some parts may be possession of other parts; but if you say possession of one piece of land is possession of another, though there

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there be no evidence of that other being granted by the charter, you must show possession of the land granted by the charter: and if you had shown possession in 1784, and that that spot was granted by the charter, that would have called on the Court to say your possession was under the charter; but if you had not possession of this part of the premises that you allege are included in the charter previous to 1784, how are you to make out that you have a title to it because you have other land, unless you show it was included. Now you have no other way of showing that, but by showing you have had possession previous to that time, or by showing the land is named in the charter, which you cannot show but by the description or reference to the maps, which are not produced; and if you cannot show you had possession previous to 1784, it would take this turn: if the public were in possession from the time of the grant, the possessor would be the Crown; and then though there were a possession of the Crown you would have no entry, and if you entered in 1784 on the title of the Crown, you could not be settled in that possession until after a lapse of sixty years and no adverse title set up: if therefore the Crown had got a title against its own grant by non-user up to 1784, you have not a title because you have not had an enjoyment for sixty years. And there is another objection which makes it extremely strong, because there is not only the ground of objection as it may be in the language of the finding of the inquisition, which is only a finding of what is reported, but that finding goes only to the

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the lands contained in those maps or surveys; and if therefore any thing passed under the general words beyond what are described in the maps, there is no inquisition at all.

[*Lord REDESDALE.*—"I apprehend there is a part of the land in possession under these letters-patent, which is described in the letters-patent, it is what extends from the passage near the town of *Lymington*, towards the bridge. Now that is to my knowledge embanked, and I believe has been for a vast number of years—that is in possession, I believe, under the grant. Now below that the whole coast, almost from thence to *Sussex*, is included in this grant; and every person who knows the coast must know that at least ninety-nine one-hundredth parts of it cannot be included in these letters-patent.

"That would make the letters-patent partially void, therefore that makes it highly important to see what those maps and surveys were, because they would ascertain these 5189 acres granted, and nothing else will; and therefore the other part of the inquisition, in the terms of it, not finding positively that it would not be to the damage of any person, but only as it is reported."]

Objection that the title of the grantee could not on this record be made the principal question between the parties.

It was made a question also of much importance whether, with reference to the objects and the immediate end of this suit, the validity of the Appellants' title to the land on which the alleged nuisances were placed—in other words, the efficacy

cacy of the grant, could be impugned by an information of this nature, or put in issue on a record so framed as was the present; and it was strenuously contended that it could not, or that if it should come incidentally into question, it ought not to be made the main object of the discussion so as to preclude the real subject-matter of litigation between the parties.

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On the part of the Crown, *Jervis* (after a minute investigation and full statement of the pleadings in the cause, and the questions raised by the allegations on either side) contended, as on the argument below, that the grant by these letters-patent could not be supported; that the mudland claimed was not the property of the Appellants, and that the wharf and timber pound were encroachments and a purpresture on the Crown, or a nuisance to the public.

Argument for  
the Crown.

The substance of the main parts of the argument before the House, in support of the information, and the judgment of the Court of Exchequer, will be found in the judgment as delivered by the Lord Chief Baron, *ante*.

It was put principally, as before, on the ground that the grant was invalid generally, because it had proceeded upon a foundation which would not sustain it, inasmuch as it was founded upon an authority which, having been exceeded in the execution of it, did not warrant the instrument intended to be the result of it, to the efficacy and

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and validity of which a proper and due execution of the preliminary measures which had been made necessary to the proposed grant was essential and indispensable.

It was further insisted that the grant was void as to the particular place in question, for want of a specific description of the part claimed; for that no general words would operate to convey what was not particularly expressed in the enumeration of the parcels professed to be granted by the letters-patent, and on that point, in opposition to the doctrine applied to this case by the counsel for the Appellants, from the 10th Rep. they cited Roll. Abr. 195, E. c. 194, where it is said the King cannot grant by general words what he holds by virtue of his prerogative. He also referred on the same point to the case of *The Attorney General v. Sir Edward Fermor*, (a) T. T. 18 Car. 2. That, he observed, was an information by English bill for lands derelict upon the sea coast, wherein the case, as drawn by consent of parties, was King *James I.* granted to *I. S.* certain particular marsh lands bordering upon the sea, et ex uberiori gratia, granted omne solum, fundum, terram, arenam, terram mariscal' contigue adjacen' præmissis, quæ modo inundat' vel aqua maris cooperta existunt, and so on, non obstante non nominando valorem, quantitatem sive qualitatem. After this 100 acres became derelict by the sea adjoining to the marshes before particularly granted, and whether it be-

(a) 2 Lev. 171.

longed

longed to the king or to the patentee, was the question. It was argued the king should have it. First, because the king had not these 100 acres since become derelict, and could not grant that which was not in him to grant. Secondly, this is to pass a parcel of lands which the king has by his prerogative, which cannot pass by general words. Thirdly, if any thing shall pass, it must be only so much as in a line borders upon the parcels before granted, otherwise should the sea by recession leave ten or twenty miles of sand, what must be the boundary? Surely the patentee is not to have all this extent of soil. To this it was answered, that the king may grant that which is not actually in him at the time of the grant, as it is in *Dyer*, 108 a, 252 b, the marriage of a ward quando acciderit, and yet the king too hath the ward in right of prerogative. Here is as much certainty as the fact was capable of, no number of acres or description of the soil, quia non constat what it would be; and to say that in that respect the grant is not good, is to argue against the prerogative, and make the king in a worse condition than the subject; scil. that he hath lands but cannot grant or dispose of them. Thirdly, the non obstante will make it good if not good without it, for it is non obstante non nominando valorem, qualitatem sive quantitatem, which implies all the objections which are or can be made against the grant—for which Coke was cited. Afterwards *Montague*, Chief Baron, et curia, with the advice of the Chief Justices *Rainsford* and *North*, held that nothing passed by these general words

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words, but the patent as to the 100 acres, which became derelict after the patent, was void. Evidently upon the ground that the king having this property *jure prerogativæ*, the soil in question, which was there claimed in point of form for His Majesty by English bill, did not pass to the person who claimed to hold it under that instrument.

The third objection taken to the validity of the grant, as conveying to the Appellants the land in question, was, that on the face of the letters-patent there was an object and a purpose expressed as to the use and application of the subject-matter granted, which were illegal, as being incompatible both with the private right of the Crown and the public interest of the king's subjects therein with reference to each other, in that the former could not be granted by the Crown to such an extent as to be detrimental to the latter, to which it must ever remain subject.

The very terms of the grant, therefore, being expressly that “ *the grantees, their heirs and assigns, may at their pleasure freely and lawfully embank, bank in, and retain banked, all and singular the premises by these presents above granted, or mentioned or intended so to be, as well against the sea as any other place, without the least interruption or denial of us, our heirs and successors, or any other person or persons, and to erect and make any bank, sluice, or cut, or any of them, from time to time, upon the premises or any part thereof, for the defence* and

and better maintenance of the premises, and for letting forth and keeping out the sea from overflowing the premises."

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This, it was insisted, the Crown could not grant, because it would divest the subject of a public right which the king's grant could not affect. On that point he referred to the doctrine of Lord *Hale*(a), who says, "But though the subject may thus have the propriety of a navigable river part of a port, yet these erections are to be added, (viz.) first, that the king hath yet a right of empire or government over it, in reference to the safety of the kingdom and to his customs, it being a member of a port prout inferius dicitur. That the people have a public interest, a jus publicum of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, as shall be shown when we come to consider of ports. For the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified."

He again referred to Lord *Hale* De Portibus Maris, chapter on the jus publicum, p. 84, where

(a) De Jure Maris, cap. 6, p. 35.




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he says, " But when a port is fixed or settled by such means, though the soil and franchise or dominion thereof *prima facie* be in the king, or by derivation from him in a subject, yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade, and intercourse. And this public right consists, among other things, principally in these: first, they ought to be free and open for subjects and foreigners to come and go with their merchandize. But touching this, and how far, and by what means, and upon what occasion there may be interdictions in this kind, shall be at large considered in the following chapters. 2. There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old enhanced, whereof before in the precedent chapters. 3. They ought to be preserved from impediments and nuisances that may hinder or annoy the access, or abode, or recess of ships, and vessels, and seamen, or the unlading or relading of goods." So in 89, concerning this *jus regium*, he says, " But the right that I am now speaking of is such a right as belongs to the king *jure prerogativæ*, and it is a distinct right from that of property; for, as before I have said, though the dominion of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men, and so it is charged or affected with that *jus regium* or right  
of

of prerogative of the king, so far as the same is by law invested in the king."

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Upon those authorities he submitted that the grant was void upon the face of it, on the last objection alone; because it is destructive of this *jus publicum*, as being a grant to an individual not only of shores, but of many ports and parts of ports, without regarding the *jus publicum*, subject to which alone the king can grant his *jus privatum*; for they are empowered by the grant to fence in the shores, the effect and mischief of which would be to exclude all persons whatever from passing and repassing, and permitting the obvious inconvenience of making a new frontage to the sea, so as to exclude all individuals not only from the right of landing, but from their own lands, and that is authorized by the terms of the grant "to embank and fence in with walls."

Those, he urged, were the principal objections arising from the face of the grant. A further objection taken and insisted on to the validity of the letters-patent was, that the grantees had never taken or had possession of the subject-matter of the grant, which was connected with the present suit, till 150 years after the date of the instrument, during all which period they had not acted in any manner under colour or pretence of the grant, but, on the contrary, had suffered the Crown to keep possession by the use made of

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it by the king and his subjects. [See *Charge in Information*, p. 387.]


It was then urged, that taking it for the sake of the argument that the letters-patent were not originally void on any of the grounds relied upon, they were lost and had become inefficient from not having been acted upon; in other words, they had been shown to have been abandoned and surrendered by the effect of non-user, from neglect or laches on the part of the grantees in not doing what they had undertaken to do in the embanking and fencing within the prescribed period mentioned in the grant, expressly for the *increase of the revenue of the Crown of England*.

The argument on this part of the case, which was of course very long, being illustrated and supported by a very minute reference to the charges in the pleadings and to the various provisions of the letters-patent, was, in substance, much the same as is to be found in the delivery by the Lord Chief Baron *M'Donald* of the judgment of the Court. [*Ante*, p. 399, *et seq.*]

On the question of nuisance, the argument was addressed wholly to the matter of fact, as it had been on the part of the Appellants.

It was also insisted on the part of the Crown, that the question of the Defendant's title did necessarily arise out of the pleadings on this record,  
and

and that it would be most material to the decision of the suit that it should be ascertained whether the title to the soil was in point of fact in the Crown or in the Appellants, with reference to the nature and objects of the information and the prayer of the bill.

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*Wyatt* was stopped by the Lord Chancellor.

*Hart* having replied, the House gave judgment on the whole case at the close of the argument, through the ordinary medium, and in the usual manner, as follows :

ELDON, *Lord Chancellor*.—" My Lords, I shall Judgment.  
 not break in upon your lordships' usage by offering any reason for the affirmance of this judgment, but I am anxious to say this, and this only, that as I conceive where there has been a possession for sixty years under this grant, nobody can be removed, so I desire not to be understood to imply one way or the other what may be the effect of these letters-patent with respect to any one part of the land which this instrument covers, except the soil on which these buildings are erected.

It is my judgment, that on the circumstances now before your lordships there is matter sufficient to put in issue on this record the question of the validity of this grant—that looking to these letters-patent, with respect to this soil;

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soil, I am of opinion that the Court of Exchequer have stated a proposition, true in law, that the title is in his Majesty.

“ I give no opinion as to the effect of any use that has been made of the land.

“ On the grounds I have stated, I think that this judgment ought to be affirmed.”

Judgment affirmed.

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## APPENDIX

TO

## THE PORTSMOUTH HARBOUR CASE.

*Transcript-Grant to Mary and William Wandesforde of  
Mud Lands in Portsmouth Harbour, 4 Ch. I.*

**Rex** Omnibus ad quos &c Salutem: Cum Nos p  
Comissionem nram sub Sigillo nro Sc<sup>c</sup>ij nri gereñ dañ  
decimo l<sup>c</sup>io Die Februarij Anno Regni nri primo plenam  
Potestatem & Auctoritatem dedimus & concessimus dilectis &  
fidelibz nris Thome Fanshawe, Militi Supervisor nro generali  
omniū Honor<sup>u</sup> Castr<sup>u</sup> Dñioz Maner<sup>u</sup> traç Tenitoz & alioz  
Hereditamentoz nroz infra Regnū nrm Anglie, Daniel  
Norton Militi Vir<sup>u</sup> Com<sup>u</sup> nri Southt, Necnon dilectis nob  
Johi Lamphere Majori Civitatis Winton<sup>u</sup> Samueli Nuse  
Armigo Majori Burgi Novi Lymington in dco Com<sup>u</sup> nro  
Southt Thome South Armigo Johi Button Armigo & Willo  
Wiltshire Gefoso sive tribz vel duobz eoz ad supvidend  
& plustrand tam p Sacm pboz & leg Homiū dci Com<sup>u</sup> nri  
Southt quam p Exaiaçoes & Deposicoes quocunq Fide  
dignoz ac omibz alijs Vijs Medijs & Modis quibz melius  
potint, Omnes illas & singulas Port Crēs Lās & Terr<sup>u</sup> que  
ante tunc fuerint p Mare inundat & submers Anglice sur-  
rounded and overflowne with the Sea, & que jacent & abut-  
tant juxta sup vel ppe Vill de Emaworth Vill de Langston  
Insul de Haling, quend Maris vocat Drayton Marsh, Vill  
de Wymaringe, Insul de Portsea, Castrum de Portchester,  
Port de Portsmouth, Fareham Haven, quend Lōs vocat  
Hoefforde, Pontem vocat Wellington Bridge, Vill de Gos-  
porte, Castr<sup>u</sup> vocat Haselworth Castle, quendam Locum  
vocat Browne Downe Beacons, Vill de Lymington, quen-

dam Portem vocat Bolderbridge, quendam Locum vocat Bulwarkes Pointe, quendam Port vocat Key Haven, quendam Locum vocat Stearte Lake adjungen' cuidam Loco Anglice vocat the Chessell or Beach, Castrum vocat Hurst Castle in dco Com' nro Southton sive aliqu' eoz includend, Port de Lymington, Port vocat Key Haven, quendam Locum vocatum Penington Baye, Locum vocat Stearte Lake cum omibz alijs Crecis Lās & Iris simili' inunda' & submers Anglice surrownded and overflowne with the Sea, int' pdict Passag' de Lymington pdict & pdict Le Chessell sive Beach de Hurst Castle pdict, Necnon ad inquirend in forma pdca si pdict Terr' & cetera pmissa sic p Mare inunda' & submers obtineri & recuperari ab Inundaōe Maris possint aut non. Et de Numero & sep'alibz Numeris Acraz pdict Terr & ceter' pmiss ad que Castr' Vill & at sepat scitu-entur & abuttant, & utrum Acquisicio & Obtencō pdcaz t'raz & cetoz pmissoz fore recupat ab Inundaōe Maris sint aliquod Dampnu' sive pjudiciu' alicui p'one sive aliquibz psonis, Et ad quod Dampnu' sive pjudiciu', Necnon utrum Acquisicō sive Obtencō pdcaz t'raz & cetoz pmissoz sic p Mare inunda' fūint ad Advantag' & Beneficiu' sepat Part' Com' pdict & ad Increment' Revenconu' nraz & Successoz nroz. Ac p pdcam Comissionem pdcis Comissionarijs aut aliquibz duobz sive pluribz eoz mandavimus tam Supvis & Inquisiis si quas inde in pmissis cepint coram Baronibz de Sc'cio nro apud Westm' quam cicius polint & tandem a Die Pasche in unu' Mensem p' sequen' Dat' supradict sub Sigillis suis aut sub Sigillis aliquoz duoz sive plur' eoz p quos Supvis & Inquisiis ill' fact' fūint Curie nre tunc ibm unacum pdict Comissione nra libare ut p eandem Comissionem Relacōn' eidem fact' & hū plenius liquet & apparet, Ad quem Diem (ut nob' pfertur) Comissionar' Videlt Jo'hes Lamphere & Wittus Wilshire duo Comissionar' in Comissione pdict noiat & p eandem auctorizat' retornaverunt Comissionem pdcam unacum quadam Inquisicōe eidem annex indors sic, Scilt, Execucō istius Comissionis patet in quadam Inquisicōe huic Comissioni

annex, Et Tenor Inquisitionis p̄dce sequitur in hec v̄ba,  
 Scilt, Southton, Inquisiō indentata capta apud Le Towne-  
 hall Civitatis Winton in Com' p̄dco Vicesimo Die Aprilis Transcript of  
the inquisition.  
 Anno Regni Dñi n̄ri Caroli Dei Ḡra Anglię Scocie  
 Francie & Hib̄nie Regis Fidei Defensoris &c S̄do coram  
 Joñe Lamphere Majore Civitatis Winton' p̄dic̄ & W̄llo  
 Wilshire Gefoso Virtute Comissionis d̄ci Dñi Regis  
 eisdem Joñi Lamphere & W̄llo Wilshire alijsq; Comis-  
 sionarijs direct̄ ad supvidend̄ & plustrand̄ quasdem t̄ras in Object recited.  
 Com' Southton p̄dic̄ p̄ Mare inundā & submers̄ Anglice  
 surrounded in Comissione p̄dic̄ menōnat, Necnon de alijs  
 Articulis & Circumstancijs p̄miss̄ tangen', p̄ Sac̄m Jacobi  
 Crosse, Thome Backshell, W̄llo Gatheridge, Rob̄ti Page,  
 Thome Newland, Joñis Hayes, Thome Smith, Wal̄i Drue,  
 W̄llo Meeservice, Jacobi Lee, Rob̄ti Wavell, Steph̄i  
 Elinge & Edwardi Brooker p̄boꝝ & leḡ Hōiu' Com' p̄dic̄.  
 Qui Dicunt sup̄ Sac̄m suu' qđ quedam Terr' p̄dic̄ in p̄dca  
 Comissione menōnā se extendunt a Villa de Emsworth in  
 Com' p̄dco scituā in orientā pte Com' p̄dic̄ sup̄ Lā  
 Com' Sussex & sic extendunt occidentali' usq; ad Villam  
 de Langhstone in Com' Southton p̄dic̄ includen' ōmes  
 Crēs Lās Terr' inundā sive submers̄ Anglice surrounded  
 Groundes in & circa Insul de Halinge in Com' Southton  
 p̄dic̄, Ac includen' p̄t Portus jacen' in Insul de Halinge  
 p̄dic̄ & Vill de Emsworth & Langstone p̄dic̄ in Com  
 Southton p̄dic̄, Et a p̄dca Villa de Langstone extenden'  
 ul̄ius occidentali' ad Mariscum vocā Drayton Marshe in-  
 cluden' ōmes t̄ras inundā & Partem Portus de Langstone  
 p̄dic̄ & a Marisco p̄dco ul̄ius extenden' occidentali' ad  
 Villam de Wymaringe in Com' South̄ p̄dic̄ includen'  
 ōmes Crecas Lacus & t̄ras inundā in & circa Insul de  
 Portsea in Com' Southton p̄dca & a Villa de Wymaringe  
 p̄dic̄ extenden' occidentali' ad Villam & Castrum de Port-  
 chester includen' ōmes t̄ras inundā p̄tem Portus de Ports-  
 mouth in Com' Southton p̄dic̄ & a Vill & Castr̄ de Port-  
 chester p̄dic̄ ul̄ius extenden' occidentali' ascenden' p̄  
 Portum vocā Fareham Haven usq; ad Hoefforde in Com'  
 Southton p̄dic̄, Et sic boreali' ascenden' p̄ Portum de



Fareham p̄dic̄ ad Pontem vocat̄ Wallington Bridge juxta Vill̄ de Fareham p̄dic̄, includen' om̄es l̄ras inundat̄ & ptem Portus ultime menēon̄at, Et ab Hoefforde p̄dic̄ orientali' & australi' orientali' Anglice East Southeast ad Villam de Gosporte in dco Com' South̄ton & abinde tenden' sive ducen' australi' ad Castrum vocat̄ Haselworth Castle in Com' South̄ton p̄dic̄, Et abinde extenden' occidentali' usq; ad Locum vocatum Browne Downe Beacons includen' om̄es Creas Lacus & l̄ras inundat̄ sup occidentat̄ Lacus Portus de Portsmouth p̄dic̄ & ad Littus australi' inf̄ p̄dic̄ Browne Downe Beacons & Hoefford sup̄ius sp̄ificat̄. Et ult̄ius Juratores p̄dic̄i sup Sac̄m suu' p̄d̄em Dicunt qđ at Port̄ L̄as Cr̄es Terr' inundat̄ jacen' sup occidentat̄ Littus p̄dic̄ Com' South̄ton primo se extendunt a Loco Passaḡ juxta Vill̄ de Lymington in Com' South̄ton p̄dic̄ & abinde ten' boreali' usq; ad Pontem vocat̄ Bolderbridge, Et abinde tenden' australi' & australi' orientali' Anglice South South East usq; ad quendam Locum vocat̄ Bulwarkes Pointe in Com' p̄dic̄, Et abinde australi' usq; ad Oxey Pointe in eodem Com', Et abinde australi' & occidentali' Anglice Southwest usq; ad Portum vocat̄ Key Haven in Com' South̄t̄ p̄dic̄, Et abinde occidentali' usq; ad Lacum vocat̄ Stearte Lake adjungen' Loco vocat̄ the Chessell or Beach Castri vocat̄ Hurst Castle in Com' South̄ton p̄dic̄ includen' Port̄ de Lymington Port̄ vocat̄ Key Haven, quendam Locum vocat̄ Penington Baye, Lacum vocat̄ Stearte Lake cum om̄ib; Creis Lacub; & l̄ris inundat̄ infra p̄dic̄ Passaḡ de Lymington p̄dic̄ & p̄dic̄ Le Chessell sive Beach de Hursts Castle p̄dic̄. Et ult̄ius Juratores p̄dic̄i sup Sac̄m suu' p̄d̄em Dicunt qđ om̄es parvi Portus Crece Lacus & ptes magnos Portuu supra sp̄ificat̄ discrip̄t in duab; Tabulis Geographis sive Mappis Sup̄vis Anglice Mapps of Survey confect̄ p Edwardum Mansell Gēssum, Et Juratores p̄dic̄i sup Cap̄d̄em hujus Inquisiōis in Evidencijs ostens̄ accrescant in toto ad Numer' Ter Mille Nongent̄ Vigin̄ triu' Acras inundat̄ sive submers̄ & qđ p̄dic̄ Terr' inundat̄ sive submers̄ Anglice surrounded discrip̄t etiam in duab; supradic̄

Tabulis Geographisis sive Mappis supvis Anglice Mapps of Survey accrescunt in toto ad Numer' Mille quingentas Acras, Et qđ Acquisitō sive Obtencō eorūdem ab Inundatōe sive Submōe Maris ut p̄fertur non sunt aliquod Dampnū sive p̄judiciū alicui p̄sone sive p̄sonis, Et qđ Acquisitō sive Obtencio p̄dicti Terr' ab Inundatōe sive Submōe Maris ut p̄fertur sint et impostes futur' sint ad magnū Advantagiū Beneficiū & Emolumentum sepaliū Partiu' Com' p̄dicti respective adjungen'. In cujus Rei Testimoniū tam p̄fāt Comissionar' quam Juratores p̄dicti huic Inquisitōi Sigilla sua alternatim apponi fecerint Dat' Die Anno & Loco supradictis. In quibz duabz Tabulis Geographicis sive Mappis p̄dicti Anglice Mapps of Survey & similiter retorn in p̄dicti Cur' Sc'cijs n̄ri Omnia & singula p̄missa cum singulis & sepalibz suis Metis & Yminis Anglice Meetes and Boundes nob' ut p̄fertur p̄ticularit' expressē sp̄ificat, Et in eisdem Tabulis separat Numer' om̄iu' & singulaz Acras p̄cell Terr' in eisdem contenti similiter sunt expressē ut p̄ easdem Tabulas Relatōn' eisdem facti & habiti plenius liquet & apparet. Cumq; Nos tam p̄ & in Consideratōe boni veri fidelis & acceptabilis Servicij p̄charissimo Pri n̄ro defuncti & nob' p̄ dictum nup Servien' n̄rm Rob̄m Pamplyn modo defuncti nup unū Valector' Garde-robe Robar' n̄raz facti existit & impens Intencōem n̄rimus & regat p̄miss fecimus dare & concedere dco Robto Pamplyn heredibz & Assign' suis imp̄pm Omn' & singul Terr' & Maris surrundaī inundaī ac subdit Inundatōni Maris in dco Com' n̄ro Southton In p̄secutōe cujus regat p̄miss n̄ri p̄dicti, p̄dicti Robtus Pamplyn unacum Maria Wandesford Vidua nup Relicti Georgij Wandesford de Kirklington in Com' Ebor Militis defuncti un' Fit & Hered apparen' p̄dicti Robti Pamplyn & Willus Wandesforde de Grayes Inne in Com' n̄ro Midd Armig Mariū Margaret at Fit et Hered apparen' ejusdem Robti Pamplyn, divsas magnas Sumas legalis Monete Anglie in Executōe p̄dicti Comissionis ac Capōis p̄dicti Inquisitōis & p̄dicti Supvis expenderunt Sed d̄ctus Robtus Pamplyn ut nob' refertur obiit antequam

Lras nras Patentes pmissos obtinuat. Sciatis igitur qd Nos in Complemento & pformaçõe pdicti regat pmissi nri pdicti dilco servienti nro Robto Pamplyn pantea facti & concessi ac in Consideraçoẽ & Compensaçoẽ magnaz Expensaz tam antehac ut pfertur p pdcam Mariam Wandesforde & Wiffum Wandesforde facti & pstiti quam p pdicti Mariam Wandesforde & Wiffum Wandesforde Hered Executores Deputati sive assigni suos impostez expendend & faciend in Maris includend ac a Mari recupand pmissi sive tantum aut quantum eoz sic includere & a Mari recuperare possunt vel suscepint aut agredientur ad Incrementum Revenõnu Corone nre Anglie ac p diuisis alijs bonis Causis & Consideraçoibz nos ad psens spiali moten De Gra nra spiali ac ex cta Sciencia & mero Motu nris Dedimus & Concessimus ac p psentes p nob Hered & Successoribz nris Damus & Concedimus pfa Marie Wandesford & Wiffo Wandesford Hered & Assigni suis impm Totam illam parvam Insulam nram Anglice vocat Fowle Island circumdata Mari Anglice surrounded by the Sea, abbuttan australi & p occiden Anglice South and by West a Villa de Emsworth continen p Estimaçoem tres Acras unu Virga & Vigin pti Terr cum suis Juribz Membris & ptinen uniuis in dco Com nro Southton. Necnon totam illam parcellam tre nre inunda Anglice vocat Oaze que quondam fuit aut modo inunda aut subdit est Inundaçoi Maris, Anglice overflowne or subject to the Overflowing of the Sea, scitua jacen & existen in Villam de Emsworth pdicti & Villas de Warblington, Wade, Havant & Langstone & septentriona p Insul de Halinge continen p Estimaçoem Sex cent nonagint & unam Acram & Vigin pti Terr sive plus sive minus cum suis Juribz Membris & ptinen uniuis in dco Com nro Southton, Necnon toĩ ill Sal Mari nri Anglice vocat Pearetree Pointe Salt Marshe qui modo fuit and modo inunda aut subdit est Inundaçoi Maris Anglice overflowne or subject to the overflowing of the Sea, scitua jacen & existen in Villas de Emsworth & Warblington pdicti continen p Estimaçoem quinq Acras & duas Virga

Terr<sup>9</sup> sive plus sive minus cum suis Juribz Membris & ptinen<sup>9</sup> uni<sup>9</sup>sis in dco Com<sup>9</sup> nro Southton, Necnon omes illi tres at Sal<sup>9</sup> Mari<sup>9</sup> nostr<sup>9</sup> Anglice Salt Marshes qui quondam fuerunt aut modo inunda<sup>9</sup> sunt aut subdi<sup>9</sup> sunt Inunda<sup>9</sup>coi Maris Anglice overflowne or subject to the overflowing of the Sea, abbutan<sup>9</sup> sup vel ppe septentrional<sup>9</sup> p<sup>9</sup> Later<sup>9</sup> Insule de Haling p<sup>9</sup>dict<sup>9</sup> adjungen<sup>9</sup> sive abbutan<sup>9</sup> ad quosdam L<sup>9</sup>os Anglice vocat<sup>9</sup> Duckard's Pointe & Swansneast Pointe continen<sup>9</sup> p Estima<sup>9</sup>coem quinquagint<sup>9</sup> Acras t<sup>9</sup>re sive plus sive minus cum suis Juribz Membris & ptinen<sup>9</sup> uni<sup>9</sup>sis in dco Com<sup>9</sup> nro Southton, [&c. &c.—enumerating and describing in the same mode a very considerable quantity of marsh and oaze lands, and amongst them the following, which are here mentioned because they were supposed in the argument to bear upon the claim of the Defendants]—Necnon totam illam Parcellam Tr<sup>9</sup>e nre inunda<sup>9</sup> Anglice Oaze que quondam fuit aut modo inunda<sup>9</sup> aut subdi<sup>9</sup> est Inunda<sup>9</sup>coi Maris Anglice overflowne or subject to the overflowing of the Sea existen<sup>9</sup> unu<sup>9</sup> p<sup>9</sup> cuiusdam Crece coi<sup>9</sup> vocat<sup>9</sup> Eason Creeke que jacet orientali<sup>9</sup> a quodam Molendino aquatico coi<sup>9</sup> vocat<sup>9</sup> Anglice the Tyde Mille de Forton in Com<sup>9</sup> nro Southton p<sup>9</sup>dict<sup>9</sup> continen<sup>9</sup> p Estima<sup>9</sup>coem quinquagint<sup>9</sup> duas Acras tres Virga<sup>9</sup> & Vigin<sup>9</sup> pti<sup>9</sup>s t<sup>9</sup>re sive plus sive minus cum suis Juribz Membris & ptinen<sup>9</sup> uni<sup>9</sup>sis in Com<sup>9</sup> nro Southton, Necnon totam illam Parcel<sup>9</sup>lam Tr<sup>9</sup>e nre Anglice Oaze, que quondam fuit aut modo inunda<sup>9</sup> aut subdi<sup>9</sup> est Inunda<sup>9</sup>coi Maris Anglice overflowne or subject to the overflowing of the Sea, existen<sup>9</sup> alter<sup>9</sup> par<sup>9</sup> Crece ultimo men<sup>9</sup>conat<sup>9</sup> continen<sup>9</sup> p Estima<sup>9</sup>coem Sex Acras & unu<sup>9</sup> Virga<sup>9</sup> t<sup>9</sup>re sive plus sive minus cum suis Juribz Membris & ptinen<sup>9</sup> uni<sup>9</sup>sis in dco Com<sup>9</sup> nro Southton, Necnon totam illum salsum Mariscum firm Anglice Salte Marshe qui quondam fuit aut modo inunda<sup>9</sup> aut subdi<sup>9</sup> est Inunda<sup>9</sup>coi Maris Anglice overflowne or subject to the overflowing of the Sea, scitua<sup>9</sup> jacen<sup>9</sup> & existen<sup>9</sup> septentrionali<sup>9</sup> orientali<sup>9</sup> Anglice Northeast of the Tyde Mille de Forton supramen<sup>9</sup>conat<sup>9</sup> continen<sup>9</sup> p Estima<sup>9</sup>coem Sex Acras

T're sive plus sive minus cum suis Juribz Membris & ptinen' uniſsis in dco Com' nro Southton, Necnon totum illum salsum Mariscum nrm Anglice Salte Marshe qui quondam fuit aut modo inundať aut subdiť est Inundaťoi Maris Anglice overflowne or subject to the Overflowing of the Sea, scituať jacen' & existen' australiť ad Lat' prioris Partis de Eason Creeke supramenťonať continen' p Estimaťcoem Octo Acras T're sive plus sive minus cum suis Juribz Membris & ptinen' uniſsis in dco Com' nro Southť, Necnon totam illam pcellam T're nre inundať Anglice Oaze coĩť vocať Anglice Stoke Lake que quondam fuit aut modo inundať aut subdiť est Inundaťoi Maris Anglice, overflowne or subject to the Overflowing of the Sea, scituať jacen' & existen' australiť occidentaliť Anglice Southwest a Ville de Gosporte in Com' nro Southť pđicť ad Villam de Alverstocke in eodem Com' continen' p Estimaťcoem Centum Viginť Acras T're sive plus sive minus cum suis Juribz Membris & ptinen' uniſsis in dco Com' nro Southton, Necnon totum illum salsum Mariscum nrm Anglice Salte Marshe qui quondam fuit aut modo inundať aut subdiť est Inundaťoi Maris Anglice overflowne or subject to the Overflowing of the Sea, scituať jacen' & existen' australiť ab occidentať parte Lacus vocať Stokelake ultim' menťonať continen' p Estimaťcoem Octo Acras T're sive plus sive minus cum suis Juribz Membris & ptinen' uniſsis in dco Com' nro Southton, Necnon totum illum salsum Mariscum nrm Anglice Salte Marshe qui quondam fuit aut modo inundať aut subdiť est Inundaťoi Maris Anglice overflowne or subject to the Overflowing of the Sea, scituať jacen' & existen' inť duas Creas de Stokelake ulť menťonať continen' p Estimaťcoem Sex Acras T're sive plus sive minus cum suis Juribz Membris & ptinen' uniſsis in dco Com' nro Southť. [After enumerating many other marshes and oazes, the grant thus proceeds]—Que omnia & singula sepalia pmissa supius menťonať & spificat ultra tres Part' pđicť Terr' ppe Hilsey & Portsey postea in pſentibz except' in toto extendunt ad Numer' Quinq, Mill

Centum & octogint novem Acr<sup>2</sup>, ut p<sup>r</sup> p<sup>r</sup>dict<sup>r</sup> Tabulas sive Mappas Sup<sup>r</sup>vis Anglice Mapps of Survey, Relac<sup>o</sup>e eisdem fact<sup>r</sup> & h<sup>u</sup>ic plenius liquet & apparet. Et ult<sup>r</sup>ius de ubiori G<sup>r</sup>a n<sup>r</sup>a sp<sup>u</sup>iali ac ex Et<sup>a</sup> Sciencia & mero Motu n<sup>r</sup>is dedimus & concessimus Ac p<sup>r</sup> p<sup>r</sup>sentes p<sup>r</sup> Considerac<sup>o</sup>ibz p<sup>r</sup>dictis p<sup>r</sup> nob<sup>r</sup> hered<sup>r</sup> & Successoribz n<sup>r</sup>is damus & concedimus p<sup>r</sup>fat<sup>r</sup> Marie Wandesforde & Willo Wandesforde Om<sup>n</sup>es & singulas illas alias T<sup>r</sup>as n<sup>r</sup>as Anglice co<sup>n</sup>it<sup>r</sup> vocat<sup>r</sup> Lez Wastes of the Sea, Oazies, Oazie Groundes, Salsos Mariscos, Crecas, Portus Anglice Havens, Lacus, T<sup>r</sup>as Anglice vocat<sup>r</sup> Inletts, Fittie Groundes, Glibses, Neales, Beaches, Bolders and Sandes que quondam fuerunt aut modo sunt inunda<sup>t</sup> aut subject<sup>r</sup> sunt Inunda<sup>o</sup>ei Maris Anglice, overflowne or subject to the Overflowing of the Sea, scitua<sup>t</sup> jacen<sup>r</sup> & existen<sup>r</sup> & abuttan<sup>r</sup> sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa le Porte co<sup>n</sup>it<sup>r</sup> vocat<sup>r</sup> Anglice Bewlewe Haven & Por<sup>t</sup> Ville de Lymington in d<sup>o</sup> Com<sup>2</sup> n<sup>r</sup>ro South<sup>h</sup>ton Ac sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa Castrum Anglice vocat<sup>r</sup> Hurst Castle vsus orient<sup>a</sup>l part<sup>r</sup> Lit<sup>t</sup> Maris Anglice, the most Easterly parte of the Sea .Coaste, Com<sup>2</sup> n<sup>r</sup>ri Dorset<sup>t</sup> adjungen<sup>r</sup> sive abuttan<sup>r</sup> d<sup>o</sup> Com<sup>2</sup> n<sup>r</sup>ro South<sup>h</sup>ton, ac sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa Vill<sup>r</sup> de Yarmouth Thorley & Aton in Insula Vectis Anglice vocat<sup>r</sup> the Isle of Weight & Por<sup>t</sup> Anglice vocat<sup>r</sup> Yarmouth Haven, Ac extenden<sup>r</sup> ab Ostio Anglice the Mouth p<sup>r</sup>dict<sup>r</sup> Por<sup>t</sup> de Yarmouth vsus Vill<sup>r</sup> de Freshwater & Thorley in Insula & Com<sup>2</sup> p<sup>r</sup>dict<sup>r</sup>, Ac sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa Vill<sup>r</sup> de Newtowne & de Shaflett in Insula & Com<sup>2</sup> p<sup>r</sup>dict<sup>r</sup>, Ac sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa quendam Locum vocat<sup>r</sup> Thorney, scitua<sup>t</sup> jacen<sup>r</sup> & existen<sup>r</sup> in<sup>t</sup> p<sup>r</sup>dc<sup>m</sup> Locum vocat<sup>r</sup> Thorney ac cer<sup>t</sup> Terr<sup>r</sup> nup<sup>r</sup> recupa<sup>t</sup> ab Inunda<sup>o</sup>e Maris co<sup>n</sup>it<sup>r</sup> vocat<sup>r</sup> Anglice Brayding Haven in Oriental<sup>r</sup> Parte p<sup>r</sup>dce Insule Vectis in d<sup>o</sup> Com<sup>2</sup> n<sup>r</sup>ro South<sup>h</sup>ton, Ac sup<sup>r</sup> juxta p<sup>r</sup>pe vel circa Lit<sup>t</sup> Maris a quodam Loco Anglice co<sup>n</sup>it<sup>r</sup> vocat<sup>r</sup> Hooke Pointe p<sup>r</sup>pe Vill<sup>r</sup> Anglice vocat<sup>r</sup> Hooke Towne, Ac a p<sup>r</sup>dict<sup>r</sup> Loco Anglice vocat<sup>r</sup> Hooke Pointe vsus Jampnu<sup>r</sup> sive Co<sup>m</sup>un<sup>r</sup> Anglice vocat<sup>r</sup> the Heathe or Co<sup>m</sup>on abuttan<sup>r</sup> sup<sup>r</sup> Parcum Prenobilis Comit<sup>r</sup> South<sup>h</sup>ton p<sup>r</sup>pe Villam Anglice the Towne of Tich-

feilde, Ac extenden' ab Ostio Portus p̄dce Ville de Tichfeilde ad ultra Villam de Busselton in dco Com' nro Southton, Ac sup juxta ppe vel circa utramq, Partem Portus vel Fluvij Anglice the Haven or River of Southton ppe Villas Anglice the Townes of Nettley and Weston & quendam Locum Anglice vocat Itchin Ferrey, Ac Villam & Com' Southton ac Villas de Melbrooke Redbridge Eling Hihe and Fawlewe in dco Com' nro Southton, Ac sup juxta ppe circa vel in' quoddam Castrum Anglice vocat Caldshott Castle ac ppe p̄dic't Portum Anglice vocat Bewlewe Haven in dco Com' nro Southton, Ac in sup juxta ppe vel circa p̄dcm Portum Anglice vocat Bewlewe Haven extenden' ab Ostio p̄dci Portus in' Villam de Exbury & quendam Domu' & quasdam T̄ras Anglice vocat Gums ad & ultra Abbatiam & Villam de Bewlewe p̄dic't in p̄dco Com' nro Southton, Ac om̄es alias T̄ras Paſ Pastur' Pra't Mariscos, Salsos Mariscos & T̄ras Mariſ nras, T̄ras Anglice vocat Glibses, Wracca't Anglice Wracks, & T̄ras nras que quondam fuerunt aut modo inunda't aut subdi't sunt Inunda'coi Maris, Littora Coster' Subbulones & Arenas nras cum to'i Increment' Maris & p̄f'is Emolument' & Hereditament' nris quibus cunq, cum om̄ibz & singulis suis Juribz Membris & p̄tinen' uni'ſis inciden' vel appenden', Ac que nup recuperat vel relic't fuerunt Anglice were forsaken or leste bare and drie by and from the Sea, cum om̄i Incremento Maris cum suis Juribz Membris & p̄tinen' uni'ſis inciden' vel appenden', ac que ad aliquod tempus de tempore in tempus imposterum derelinquentur sive a Mari recuperabuntur in sup juxta vel circa p̄dic't Villas de Emsworth & Langstone Insulam de Halinge p̄dic't Mariſ vocat Drayton Marshe p̄dcam Villam de Wymeringe, Insulam de Portsea, Castrum & Villam de Portchester, p̄dcm Portum de Portsmouth, Fareham Haven, Locum vocat Hoe Forde, Pontem vocat Wallington Bridge, p̄dcam Villam de Gosporte, Castrum vocat Hasellworthe Castle, p̄dic't Locum Anglice vocat Browne Downe Beacons, p̄dcam Villam de Lymington, p̄dcm Pontem vocat Bolder Bridge, p̄dcm Locum vocat

Bulwarkes Pointe, p̄d̄c̄m Locum vocat̄ Key Haven, p̄d̄c̄m Locum vocat̄ the Chessell or Beach, Castrum vocat̄ Hurst Castle, p̄d̄cam Villam de Bewlewe, p̄dic̄t Villas de Yarmouth, Thorley & Aton, Villas vocat̄ Newtowne & Shaflett, p̄d̄c̄m Locum vocat̄ Thorney, Villam de Ride, Portum Anglice vocat̄ Brayding Haven in Insula Vectis p̄dic̄t, p̄dic̄t Locum vocat̄ Hooke Pointe, Villam vocat̄ Hooke, Villas de Titchfelde & Busselton, Portum sive Fluviū Anglice the River of Southton, Villas de Nettley & Weston, p̄dic̄t Locum vocat̄ Itchin Ferrey, Villam & Com' de Southton, Villas de Melbrooke Redbridge Elinge Hithe Fawlewe Castrum vocat̄ Calshott Castle, Villam de Exburie, p̄d̄c̄m Locum vocat̄ Gums, Abbathiam de Bewlewe, ac ceter' Met' & lmin' quecunq; in his p̄sentibz men̄cōnat̄ sp̄ificat̄ aut alibi ubicunq; in p̄d̄co Com' n̄ro Southton p̄concess̄ men̄cōnat̄ sive inten̄s fore concess̄ p̄ p̄sentes. Et ult̄ius de ubiori Ḡra n̄ra sp̄iali & et̄a Sciencia & mero Motu n̄ris ac p̄ considerācōibz p̄dc̄is Dedimus & Concessimus ac p̄ p̄sentes p̄ nob̄ heredibz & successoribz n̄ris Damus & Concedimus p̄fat̄ Marie Wandesforde & Willelmo Wandesforde Heredibz & Assign' suis Om̄ia & singula Domos Edificia Structur' Rivulos Vivar' T̄ras mariscat̄, T̄ras recupat̄ & relic̄t a Mari, T̄ras que quondam fuerunt aut modo sunt inundāt̄ aut subdīt sunt Inundācōi Maris, Jampn', Vias, vacua Funda & Vias, Semitas Littora Crecas Bayas Locos Anglice vocat̄ Inletts, Ripas ac T̄ras Anglice Oaze sive Oazie Groundes, Fittie Groundes Glibses Neales Beaches Bolders and Sandes, Necnon Om̄es Fructus p̄ficua Com̄oditates Aquas Aquaz Cursus Locos sup̄inundāt̄ in om̄ibz & singulis Crecis Port̄ Lacubz Fluvij Rifes Anglice Rifes in̄t Fluxum & Refluxum Maris Riveras Piscorias Pescācōes & Aucupācōes in in̄t vel sup̄ p̄missis, Ac om̄ia alia Jura Jurisdic̄cōes Franchēs Lib̄tat̄ Privileḡ p̄ficua Com̄oditates Advantagia Emolumenta Possessiones & Hereditamenta n̄ra quecunq; cum eoꝝ Juribz Membris & p̄tinen' uniꝝs cujuscunq; sint Gen̄is Nature seu Sp̄ici, seu quibuscunq; Noibz sciantur censeantur nuncupentur seu cognoscantur



scituañ jacen' & existen' pvenien' crescen' renovan' con-  
tingen' seu emgen' infra vel juxta p̄dict Vilt Insut Castr'  
Creñ Port Fluvios Hamlett Locos ac ceter' Meñ & Terr' in  
his p̄sentibz supramençonañ sp̄ificañ aut intenden' fore con-  
cesñ p̄ p̄sentes aut alibi ubicunq; in p̄dco Com' n̄ro South-  
ton seu int vel infra eoꝝ aliquem vel aliquos, p̄dict T̄ras  
Tenementa Prata Pascua Pastur', salsos Mariscos, Mariscos,  
T̄ras mariscañ, T̄ras inundañ sive subdiñ Inundaçdi Maris,  
Littora, Crecas, Port Anglice Havens, Inletts, Ripas, T̄ras  
Anglice vocañ Oaze sive Oazie Groundes, T̄ras Anglice  
vocañ Glibses Aren' & ceta p̄missa supius p̄ p̄sentes p̄con-  
cesñ aut mençonañ sive intenñ fore concesñ seu eoꝝ alicui  
seu aliquibz quoquo modo spectan' p̄tinen' inciden' vel ap-  
penden' aut ut Membr' p̄t vel p̄cell eoꝝdem in p̄missis supius  
p̄ p̄sentes p̄concesñ aut mençonañ sive intenñ fore concesñ  
seu eoꝝ aliquoꝝ vel alicujus inde p̄t sive p̄cell unquam ante-  
hac h̄it accept̄ cogniñ occupañ & reputañ, ac que de tem-  
pore in tempus impostoꝝ orientur em̄gent germinabunt  
florebunt vel excrescunt ex de sup vel in aliquibz p̄miss p̄  
p̄sentes p̄concesñ aut mençonañ sive intenñ fore concesñ seu  
aliqua eoꝝ pte vel parcella, Quandocunq; p̄dca p̄missa seu  
aliqua Pars sive p̄cella dcoꝝ p̄missoꝝ respective Muris in-  
cluñ defenñ acquisiñ & recupañ erunt a Mari, aut aliñ a  
Mari relicñ Anglice shal be bancked fenced gayned and re-  
covered from the Sea or otherwise shal be forsaken and  
lefte bare by the Sea. Et ult̄ius de ubiori Ḡra n̄ra  
sp̄iali ac ex Eta Sciencia & mero Motu n̄ris ac p̄ & in Con-  
sideraçon' p̄dict Volumus & p̄ p̄sentes p̄ nob̄ hered̄ & Suc-  
cessoribz n̄ris concedimus p̄fañ Marie Wandesforde & Willo  
Wandesforde Hered̄ & Assign' suis Qd Nos Hered̄ & Suc-  
cessores n̄ri aũuatim & de tempore in tempus relaxabimus  
exon̄abimus acquietabimus & indempnes conservabimus  
tam p̄fañ Mariam Wandesforde & Willm Wandesforde Ex-  
ecutores Administratores Deputañ & Assignañ suos quam  
p̄dict Terr' Salsos Mariscos, Terr' mariscañ Anglice Oazes  
sive Oazie Groundes, Fittie Groundes, Glibses, Neales,  
Beaches, Bolders, Sandes, Terr' inundañ aut subdiñ Inun-

dañi Maris, ac cetera omnia & singula pmissa supius p  
 presentes pconcessi aut menconati sive intens fore concessi &  
 quanti inde Partem sive Parcellam cum eorum ptinen' univsis  
 vsus nos Heredi & Successores nros de & ab omnibz &  
 omiodis Decimis Garbarz Bladoz Gran' Feni Lani Lini  
 Canabis Agnellaz Plantaz Radiis Semin' & Germin', ac ab  
 omnibz alijs Decimis quibuscunqz cujuscunqz sint Genis  
 tam major' quam minor' que modo nob debent aut de  
 tempore in tempus nob Heredibz & Successoribz nris im-  
 postez devenerunt aut devenire debuerunt Rone vel ptextu  
 aliquoz pmissoz aut alicujus inde Partis vel Parcelle p  
 presentes pconcessi aut menconati sive intens fore concessi p  
 & durante tmino Septem Annoz imediate & pxim' sequen  
 post Recupaconem Inclusionem & Defensionem ab Inun-  
 datione Maris omiu' & singuloz pmissoz vel alicujus eoz  
 Partis & Parcelle respective futur' put omnia & singula  
 eadem pmissa aut aliqua eoz pars & parcella de tempore in  
 tempus impostez sic ut pfertur recuperari includi & defendi  
 ab Inundatione Maris contigint p pfa' Mariam Wandesforde  
 & Willelm Wandesforde Executores Administratores De-  
 putati vel Assignati suos aut eoz aliquem sive aliquos. Et  
 ult'ius de Gra nra spiali ac ex eta Sciencia & mero Motu  
 nris dedimus & concessimus ac p presentes p Consideracionibz  
 pdcis p nob Heredibz & Successoribz nris damus & con-  
 cedimus pfa' Marie Wandesforde & Willelmo Wandesforde  
 Heredi & Assign' suis Qd ipsi heredi & assign' sui de tem-  
 pore in tempus ad eoz Libitum libe & licite possint &  
 valeant includere & inclu' retinere Omnia & singula pmissa  
 supius p presentes pconcessi aut menconati sive intens fore  
 concessi tam contra Mare quam ullum aliu' Locum absqz  
 aliquo Detrimeto Impeticonem vel Denegaconem nostr' Heredum  
 vel Successoz nroz vel alicujus at psone vel aliqua Personaz,  
 Et aliquam Molem Sataract vel Scissur' Anglice  
 Bancke Sluce or Cutt sive aliquod vel aliqua eoz de tem-  
 pore in tempus sup pmissi sive eoz aliquoz Parcelle inde  
 erige & face p Defensione & meliori Manutenen' Anglice  
 Mayntenance pmissoz & p Extralacione & Exclusionem Maris

Anglice Letting forth and keeping out of the Sea ab Inunda-  
 cōe pmissoz. Et ult<sup>o</sup> de ampliori G<sup>ra</sup> n<sup>ra</sup> sp<sup>iali</sup> ac ex  
 c<sup>ta</sup> Sciencia & mero Motu n<sup>ris</sup> dedimus concessimus &  
 confirmavimus ac p <sup>p</sup>sentēs p <sup>Considera</sup>cōibz p<sup>dict</sup> p <sup>nob</sup>  
 Heredibz & Successoribz n<sup>ris</sup> damus concedimus & con-  
 firmamus p<sup>fa</sup>t Marie Wandesforde & W<sup>ill</sup>o Wandesforde  
 Heredibz & Assign<sup>o</sup> suis imp<sup>pm</sup> Qd<sup>o</sup> ipi p<sup>fa</sup>t Maria Wandes-  
 forde & W<sup>ill</sup>us Wandesforde Heredes & Assign<sup>o</sup> sui de  
 ce<sup>o</sup> posthac de tempore in tempus imp<sup>pm</sup> h<sup>ea</sup>nt teneant &  
 gaudeant ac h<sup>ere</sup> tenere uti & gaudere valeant & possint in-  
 fra p<sup>dict</sup> Terr<sup>o</sup> Tenementa Prata Pas<sup>o</sup> Pastur<sup>o</sup> Salsos Ma-  
 riscos, Mariscos, Terr<sup>o</sup> nup<sup>o</sup> recup<sup>at</sup> a Mari, Terr<sup>o</sup> que  
 quondam fuerunt aut modo inunda<sup>nt</sup> aut subdi<sup>nt</sup> sunt Inun-  
 da<sup>o</sup>i Maris Anglice vocat<sup>ur</sup> Glibses, Terr<sup>o</sup> marisca<sup>t</sup>, Aren<sup>o</sup>,  
 Wrecca & ce<sup>ra</sup> o<sup>m</sup>ia & singula p<sup>missa</sup> sup<sup>ius</sup> p <sup>p</sup>sentēs  
 p<sup>concess</sup> aut men<sup>o</sup>na<sup>nt</sup> fore concess<sup>o</sup> ac infra quam<sup>nt</sup> inde  
 Partem sive Parcellam deinceps imp<sup>pm</sup> tot tanta talia  
 eadem h<sup>u</sup>moi & consimilia Regalita<sup>nt</sup> Jura Jurisdic<sup>o</sup>es  
 Franch<sup>es</sup> Lib<sup>ta</sup>nt Consuetudines Privileg<sup>ia</sup> p<sup>ficua</sup> Com<sup>o</sup>ditates  
 Advantagia Emolumenta Possessiones & Hereditamenta  
 quecunq<sup>ue</sup> quot quanta qualia & que ac adeo plene integre &  
 lib<sup>re</sup> ac in tam amplis Modo & Forma p<sup>ut</sup> aliquis sive aliqui  
 p<sup>dict</sup> Terr<sup>o</sup> Ten<sup>o</sup> Pra<sup>nt</sup> Pas<sup>o</sup> Pastur<sup>o</sup> Salsos Mariscos, Maris-  
 cos, Terr<sup>o</sup> marisca<sup>t</sup>, Terr<sup>o</sup> inunda<sup>nt</sup> aut subdi<sup>nt</sup> Inunda<sup>o</sup>i Maris,  
 Aren<sup>o</sup>, Wreccas & ce<sup>ra</sup> o<sup>m</sup>ia & singula p<sup>missa</sup> sup<sup>ius</sup> p <sup>p</sup>sentēs  
 p<sup>concess</sup> aut men<sup>o</sup>na<sup>nt</sup> aut inten<sup>o</sup> fore concess<sup>o</sup> &  
 quam<sup>nt</sup> seu aliquam inde Partem sive Parcellam R<sup>o</sup>ne vel  
 p<sup>textu</sup> alicujus Charte Doni Concessionis seu Confirma-  
 cōis aut aliqua<sup>z</sup> L<sup>ra</sup>z Paten<sup>o</sup> p <sup>nos</sup> seu p <sup>aliquem</sup> Pro-  
 genito<sup>z</sup> sive Predecesso<sup>z</sup> n<sup>ro</sup>z antehac h<sup>ic</sup> fac<sup>o</sup> vel concess<sup>o</sup>  
 seu confirma<sup>nt</sup> aut R<sup>o</sup>ne vel p<sup>textu</sup> alicujus p<sup>scrip</sup>cōis Usus  
 seu Consuetudinis antehac h<sup>ic</sup> seu usita<sup>nt</sup> aut ali<sup>o</sup> quocunq<sup>ue</sup>  
 legali Modo Jure seu T<sup>it</sup>lo, Ac in tam amplis Modo &  
 Forma p<sup>ut</sup> nos aut aliquis Progenito<sup>z</sup> sive Predecesso<sup>z</sup>  
 n<sup>ro</sup>z, p<sup>dict</sup> p<sup>missa</sup> sup<sup>ius</sup> p <sup>p</sup>sentēs p<sup>concess</sup> aut men<sup>o</sup>na<sup>nt</sup>  
 fore concess<sup>o</sup> & quam<sup>nt</sup> seu aliquam inde Partem sive Par-  
 cellam h<sup>u</sup>imus gavis<sup>i</sup> fuimus aut h<sup>uerunt</sup> vel gavis<sup>i</sup> fuerunt

vel h̄ere uti & gaudere debuimus aut h̄ere uti & gaudere debuerunt vel debuit, Ac si eadem p̄missa fuissent M̄uris inclūs defen̄s acquisīt & recupāt a Mari Anglice had beene bancked fenced gayned and recovered from the Sea p̄ nos sive aliquem Progenitoꝝ n̄roꝝ vel Predecessoꝝ n̄roꝝ sive M̄uris includend̄ defendend̄ acquirend̄ vel recupand̄ essent a Mari, Anglice were to be bancked fenced gayned and recovered from the Sea p̄ nos sive aliquem vel aliquos Successoꝝ n̄roꝝ. Et ult̄ius de Ḡra n̄ra sp̄iali ac ex c̄ta Sciencia & mero Motu n̄ris dedimus & concessimus ac p̄ p̄sentes p̄ & in Considerācōn̄ p̄dict̄ p̄ nob̄ Heredibz & Successoribz n̄ris damus & concedimus p̄fat̄ Marie Wandesforde & Witto Wandesforde Heredibz & Assign̄ suis Ōm̄ia & singula Terr̄ Tenement̄ Prata Pas̄c Pastur̄ Salsos Mariscos, M̄ariscos, Terr̄ mariscā Terr̄ nup̄ recupāt a Mari, Terr̄ que quondam fuer̄ aut modo inundāt aut subdīt sunt Inundācōi Maris, Terr̄ Anglice vocāt Glibses, Arenas & c̄ta ōm̄ia & singula p̄missa sup̄ius p̄ p̄sentes p̄concess̄ aut men̄cōnāt aut inten̄s fore concess̄ cum eoꝝ p̄tinen̄ uniꝝsis, adeo plene lib̄e & integre ac in tam amplis Modo & Forma p̄ut ea ōm̄ia & singula p̄missa sup̄ius p̄ p̄sentes p̄concess̄ aut men̄cōnāt sive inten̄s fore concess̄ aut aliqua inde Pars sive Parcella ad Manus n̄ras seu ad Manus aliquoꝝ Progenitoꝝ sive Predecessoꝝ n̄roꝝ nup̄ Regum & Reginaꝝ Anglie aut ad Manus eoꝝ vel eoꝝ alicujus Rōne vel p̄textu Prerogative regalis Corone n̄re Anglie aut eoꝝ alicujus Rōne qđ eadem p̄missa antehac fuerunt a Mari M̄uris inclūs defend̄ acquisīt & recupāt sive alī a Mari relic̄t, Anglice had been bancked fenced gayned and recovered from the Sea or otherwise forsaken and left bare by the Sea, seu posthac sive imposteꝝ M̄uris inclūs defen̄s acquisīt & recupāt sive alī a Mari relic̄t fuerunt, Anglice shall hereafter be bancked fenced gayned and recovered from the Sea or otherwise forsaken and left bare by the Sea aut Rōne vel p̄textu alicujus Doni vel Concessionis Attinctur̄ sive Forisfur̄ aut Rōne Excaet̄ seu quocunq; alio legali Modo Jure seu Tītlo devenerunt seu devenire debuerunt ac in Manibz n̄ris jam existunt seu existe debent

vel deberent, aut postea devenire debuerunt aut possint ut si p̄dict̄ p̄missa Muris incluſ̄ defenſ̄ acquisit̄ & recupat̄, aut aliq̄ a Mari relic̄t̄ fuissent Anglice had been bancked fenced gayned and recovered from the Sea or otherwise forsaken and left bare by the Sea p̄ aliquem Progenitoꝝ sive Predecessoꝝ n̄roꝝ sive a Mari Muris incluſ̄ defend̄ acquirend̄ & recupand̄ aut aliq̄ a Mari relinquend̄ fuerunt Anglice were to be bancked fenced, gayned and recovered from the Sea or otherwise were to be forsaken and left bare by the Sea p̄ nos sive aliquos Successoꝝ n̄roꝝ **Habend̄ Tenend̄ & Gaudend̄** Ōm̄ia & singula p̄dict̄ T̄ras Ten' Prata Pas̄ Pastur' Salsos Mariscos, Mariscos, T̄ras mariscā & Terr' vocat̄ Vast̄ Maris Anglice the Wastes of the Sea Oazes als Oazie Groundes, Creſ̄, Port̄ Anglice Havens, Lacus Terr' Anglice vocat̄ Inletts, Fittie Groundes, Glibses, Neales, Beaches, Bolders, Terr' Muris incluſ̄ defenſ̄ acquisit̄ & recupat̄ sive aliq̄ a Mari relic̄t̄, Anglice bancked fenced gayned and recovered from the Sea or otherwise forsaken and lefte bare by the Sea, Terr' que quondam fuerunt aut modo inundāt̄ aut subdīt̄ sunt Inundāōi Maris, Terr' Anglice vocat̄ Glibses, Arenas Coster', Sabbulon' cum toto Incremento Maris, Reddīt̄, Reſ̄cōes, Remaneria, Privilegia p̄ficua Emolumenta, Com̄oditates Advantagia ac Hereditamenta quecunq̄, ac cet̄a ōm̄ia & singula p̄missa sup̄ius p̄ p̄sentes p̄concess̄ aut men̄cōnat̄ aut intenſ̄ fore concess̄ cum eoꝝ ptinen' uniṽsis ac quamlt̄ inde Partem & Parcellam p̄fat̄ Marie Wandesforde & Wille Wandesforde Hered̄ & Assign' suis imp̄p̄m, Ad solum & p̄p̄riu' Opus & Usum p̄fat̄ Marie Wandesforde & Wille Wandesforde Hered̄ & Assign' suos imp̄p̄m. **Tenend̄** de nob̄ heredibz & Successoribz n̄ris ut de Maner' n̄ro de Easte Greenwich in Com' n̄ro Kancie p̄ Fidelitatem tantum in lib̄o & cōi Soccagio & non in Capite nec p̄ Serviciu' Militare, p̄ ōmibz Reddīt̄ Servicijs Exac̄cōibz & Demandis quibuscunq̄ p̄inde nob̄ Heredibz & Successoribz n̄ris quoquo Modo reddend̄ solvend̄ vel faciend̄, **Reddend̄** ānuatim nob̄ Heredibz & Successoribz n̄ris de & p̄ p̄dict̄ quart̄ Part̄ p̄dict̄ Parcell

Terr<sup>9</sup> nostr<sup>9</sup> inundat<sup>9</sup> Anglice Oaze scitua<sup>9</sup> jacen<sup>9</sup> & existen<sup>9</sup> occidentali<sup>9</sup> a Parte Portus de Langstone supramen<sup>9</sup>conat<sup>9</sup> & septentrionali<sup>9</sup> a quodam Loco vulgo vocat<sup>9</sup> Anglice Master Bould's Salt Workes & orientali<sup>9</sup> a parte Insule de Portsea p<sup>9</sup>dic<sup>9</sup>t, Ac eciam de & p<sup>9</sup> p<sup>9</sup>dic<sup>9</sup>t quarta Parte p<sup>9</sup>dic<sup>9</sup>t Salsi Marisci Anglice Salte Marshe scitua<sup>9</sup> jacen<sup>9</sup> & existen<sup>9</sup> orientali<sup>9</sup> a Metis Anglice Boundes Villaz de Wymeringe & Portsea in Insula de Portsea p<sup>9</sup>dic<sup>9</sup>t, Ac eciam de & p<sup>9</sup> p<sup>9</sup>dic<sup>9</sup>a quarta Parte p<sup>9</sup>dic<sup>9</sup>t alt<sup>9</sup>ius Salsi Marisci Anglice Salte Marshe scitua<sup>9</sup> jacen<sup>9</sup> & existen<sup>9</sup> orientali<sup>9</sup> a parte Insule de Portsea p<sup>9</sup>dic<sup>9</sup>t & occidentali<sup>9</sup> a Parcel<sup>9</sup>t Terr<sup>9</sup> inundat<sup>9</sup> Anglice Oaze supramen<sup>9</sup>conat<sup>9</sup>, Quatuor Denar<sup>9</sup> p<sup>9</sup> qualt Acr<sup>9</sup>, Ac eciam Redden<sup>9</sup>t a<sup>9</sup>nuatim nob<sup>9</sup> Hered<sup>9</sup> & Successorib<sup>9</sup>z n<sup>9</sup>ris de & p<sup>9</sup> quarta parte om<sup>9</sup>iu<sup>9</sup> & singula<sup>9</sup>z ce<sup>9</sup>la<sup>9</sup>z Acra<sup>9</sup>z p<sup>9</sup>misso<sup>9</sup>z que Muris inclu<sup>9</sup>s defen<sup>9</sup>s acquisi<sup>9</sup>t aut recup<sup>9</sup>a<sup>9</sup>t aut ali<sup>9</sup> rel<sup>9</sup>ic<sup>9</sup>t erunt a Mari Anglice which shal be bancked fenced gayned and recovered from the Sea or otherwise forsaken and leste bare by the Sea a Dat<sup>9</sup> & Consec<sup>9</sup>con<sup>9</sup> haz L<sup>9</sup>ra<sup>9</sup>z n<sup>9</sup>ra<sup>9</sup>z Paten<sup>9</sup> usq<sup>9</sup> ad Festum S<sup>9</sup>ci Andree Apti quod erit Anno D<sup>9</sup>ni Mil<sup>9</sup>lmo Sexcentesimo & tricesimo, Quatuor Denar<sup>9</sup> p<sup>9</sup> qualt Acra, Ac de & p<sup>9</sup> trib<sup>9</sup>z alt<sup>9</sup>is Partib<sup>9</sup>z om<sup>9</sup>iu<sup>9</sup> & singula<sup>9</sup>z Acra<sup>9</sup>z p<sup>9</sup>misso<sup>9</sup>z que Muris inclu<sup>9</sup>s defen<sup>9</sup>s acquisi<sup>9</sup>t & recup<sup>9</sup>a<sup>9</sup>t aut ali<sup>9</sup> a Mari rel<sup>9</sup>ic<sup>9</sup>t erunt, Anglice which shal be bancked fenced gayned and recovered from the Sea or otherwise forsaken and leste bare by the Sea a p<sup>9</sup>dic<sup>9</sup>t Dat<sup>9</sup> haz L<sup>9</sup>ra<sup>9</sup>z n<sup>9</sup>ra<sup>9</sup>z Paten<sup>9</sup> usq<sup>9</sup> ad p<sup>9</sup>dc<sup>9</sup>m Festum S<sup>9</sup>ci Andree Apti quod erit p<sup>9</sup>dc<sup>9</sup>o Anno D<sup>9</sup>ni Mil<sup>9</sup>lmo Sexcentesimo & tricesimo, unu<sup>9</sup> Obulum p<sup>9</sup> qualt Acra sic Muris inclu<sup>9</sup>s defen<sup>9</sup>s acquisi<sup>9</sup>t & recup<sup>9</sup>a<sup>9</sup>t aut ali<sup>9</sup> a Mari rel<sup>9</sup>ic<sup>9</sup>t Anglice bancked fenced gayned and recovered from the Sea or otherwise forsaken and leste bare by the Sea, Ac de & p<sup>9</sup> om<sup>9</sup>ib<sup>9</sup>z & singulis alijs Acris p<sup>9</sup>misso<sup>9</sup>z que Muris inclu<sup>9</sup>s defen<sup>9</sup>s acquisi<sup>9</sup>t & recup<sup>9</sup>a<sup>9</sup>t aut ali<sup>9</sup> a Mari rel<sup>9</sup>ic<sup>9</sup>t erunt Anglice which shal be bancked fenced gayned and recovered from the Sea, or otherwise forsaken and leste bare by the Sea post p<sup>9</sup>dc<sup>9</sup>m Festum S<sup>9</sup>ci Andree Apti quod erit in Anno D<sup>9</sup>ni Mil<sup>9</sup>lmo Sexcentesimo & tricesimo, Quatuor Denar<sup>9</sup> p<sup>9</sup> qualt Acr<sup>9</sup>

sic Muris incluſ defens acquisit & recupat aut alit a Mari relict, Anglice bancked fenced gayned and recovered from the Sea or otherwise forsaken and lefte bare by the Sea, Ac de & p omibz & singulis Acris pmissos que modo sunt aut nup fuerunt aut impostez erunt Muris incluſ defens acquisit & recupat aut alit a Mari relict, Anglice which already are or hereafter shal be bancked fenced gayned and recovered from the Sea or otherwise forsaken and lefte bare by the Sea ante sive post Dat & Confecodem haz Lraz nraz Paten, Quatuor Denar p quat Acr, si modo sunt, nup fuerunt, aut impostez erunt Muris incluſ defens acquisit & recupat aut alit a Mari relict, Anglice which heretofore have benn or hereafter shal be bancked fenced gayned and recovered from the Sea, or otherwise lefte bare by the Sea, ad Festa Sci Michis Archi & Añunciacōis Bte Marie Virginis ad Receptum Sc<sup>a</sup> cij nri Westm seu ad Manus Ballivoz vel Receptoz pmissos p tempore existen p equales Porcōes in talibz Modo & Forma & post tale Tempus añuatim solvend put subsequentur, Videſt, prima Salucōe cujusit sepat pantea Reddit in Forma pdict reservat p quat sepat pmissos pantea concess incipiend ad primu Festum Sci Michis Archi, vel Bte Marie Virginis quod primo evenit post tempus quo pfa Maria Wandesforde & Wiffus Wandesforde Heredes Executores & Assign sui lttime possint here pcipe vel recipe Reddit & pficua ejusdem pcelle vel eazdem Parcellaz pdcoz pmissos p qua vel quibz iidem sepat Reddit exist in Forma pdict reservat & pacificam & lttinam Possessionem inde hebunt & gaudebunt Virtute & Vigore alicujus Judicij ad Cōem Legem, sive Vigore & Virtute alicujus Decreti in aliqua Curia Equitatis, vel Vigore & Virtute alicujus Composicōis, vel aliqua Composicōnu quam vel quas pfa Maria Wandesforde & Wiffus Wandesforde vel Hered Executores vel Assignat eoz vel aliquoz eoz fecer cum tali psona sive talibz psonis, qui tempore tat Composicōis sive Agreementi in Possessione eoz sepat pdict Pra Pasch Pastur Mor Salis Mariſ, Mariſ, Terr mariscat, Vast Maris, Terr Anglice vocat Oazes or Oazie Groundes,

Creſ, Port Anglice Havens, Laſ, Terr' Anglice vocat In-  
 letts, Fittie Groundes, Glibſes, Neales, Beaches, Bolders  
 & al Terr' pantea Muris incluſ deſenſ acquiſit & recupat  
 aut aliſ a Mari relicti Anglice formerly bancked fenced  
 gayned and recovered from the Sea, or otherwise forsaken  
 and leſte bare by the Sea, ac al Terr' que quondam fuerunt  
 aut modo inundaſ aut ſubdiſ ſunt Inundaſi Maris aut ali-  
 quoz alioz pmiſſoz, Et qui Jus Hereditam ſive Regalitaſ &  
 Juridicſ in omibz & ſingulis ſive aliquibz pmiſſoz  
 pſcoz hēre ptendent p qua vel quibz ijdem ſepat Reddiſ in  
 Forma pſca reſervaſ erunt vel exiſtenſ. Et ulſius de Gſa  
 nſra ſpiali ac ex ſta Sciencia & mero Motu nſris dedimus &  
 conceſſimus pdonavimus remisimus relaxavimus exoſavi-  
 mus & confirmavimus, Ac p pſentes p Consideraſibz  
 pſcis p nob Heredibz & Succesoribz nſris damus conce-  
 dimus pardonamus exoſamus remittimus & relaxamus pſaſ  
 Marie Wandesforde & Wiſſo Wandesforde Heredibz & As-  
 ſignſ ſuis Omnes Intruſiones Intraſſes & Ingreſſus de & in  
 pſdict pmiſſ ſupius p pſentes pconceſſ aut menſſonaſ ſive  
 intenſ fore couceſſ aut de in et ſup aliquam inde Partem  
 ſive Parcellam antehac p pſdict Mariam Wandesforde &  
 Wiſſm Wandesforde Heredes & Assignſ ſuos aut p aliquam  
 aliam pſonam ſive aliquas alias pſonas unquam antehac hſit  
 ſeu facſ ſine legali Modo Jure ſeu Tiſlo, Ac Omnes & ſin-  
 gulos Exitus Fines Reddiſ Revenſſes Añuitaſ pſicua &  
 Arreragia quecunq, omiuſ & ſinguloz pmiſſoz ſupius expſſ  
 & ſpificaſ ac p pſentes pconceſſ aut menſſonaſ ſive intenſ  
 fore conceſſ & cujuſt inde Partis ſive Parcelle quoquo Modo  
 ante Daſ haſ Lſraſ nſraſ Patenſ hucusq, pvenienſ creſcenſ  
 accidenſ incurſ ſive ſolubiſ, Ac omnia Arreragia inde, pter  
 Reddiſ Serviſ Tenurſ & Denarſ Sumſ ſupius. p pſentes re-  
 ſpective reſervaſ vel excepti, Ac inſup p pſentes p Con-  
 ſideraſibz pſcis p nob Heredibz & Succesoribz nſris  
 Damus & Concedimus pſaſ Marie Wandesforde & Wiſſo  
 Wandesforde Heredibz & Assignſ ſuis Qd Nos Heredes &  
 Succesores nſri impſm añuatim & de tempore in tempus  
 exoſabimus acquietabimus & indempnes conſervabimus



tam p̄fāt Mariam Wandesforde & Willelmum Wandesforde Heredes & Assign<sup>9</sup> suos imp̄p̄m quam p̄dic̄ Terr<sup>9</sup> Ten<sup>9</sup> Prata Pas̄c Pastur Salsos Mariscos, Mariscos, Terr<sup>9</sup> mariscat que quondam fuerunt aut modo inunda<sup>9</sup> aut subdū<sup>9</sup> sunt Inunda<sup>9</sup> Maris, Terr<sup>9</sup> Anglice vocat̄ Glibses, Terr<sup>9</sup> que nup̄ Muris inclu<sup>9</sup> defen<sup>9</sup> acquisit̄ & recupat̄ sive ali<sup>9</sup> a Mari relic̄ fuerunt Anglice which have been bancked fenced gayned and recovered from the Sea or otherwise forsaken and leste bare by the Sea, aut que impostez Muris includend̄ defend̄ acquirend̄ & recupand̄ sive ali<sup>9</sup> Mari relic̄ erunt Anglice which shal be bancked fenced gayned and recovered from the Sea or otherwise forsaken and leste bare by the Sea, Ac cetera om̄ia & singula p̄missa sup̄ius p̄ p̄sentes p̄concess̄ aut men<sup>9</sup>conat̄ sive inten<sup>9</sup> fore concess̄ & quant̄ inde Partem sive Parcellam cum eoz p̄tinen<sup>9</sup> univ̄sis vsus nos Hered̄ & Successores n̄ros de & ab om̄ibz & om̄iodis Corrod̄ Reddi<sup>9</sup> Denar<sup>9</sup> Sum̄is & om̄ibz quibuscunqz de p̄missis sup̄ius p̄ p̄sentes p̄concess̄ aut men<sup>9</sup>conat̄ sive inten<sup>9</sup> fore concess̄ seu de aliqua inde Parte sive Parcella nob̄ Heredibz vel Successoribz n̄ris quoquo modo exeun<sup>9</sup> vel solvend̄ vel sup̄inde vsus nos Heredes vel Successores n̄ros onat̄ seu onand̄, Pre<sup>9</sup>quam de Servi<sup>9</sup> Tenur<sup>9</sup> Reddi<sup>9</sup> & Denar<sup>9</sup> Sum̄is sup̄ius p̄ p̄sentes reservat̄, Volentes etiam & p̄ p̄sentes firmit̄ injungentes & p̄cipientes tam Thesaurar<sup>9</sup> Cancellar<sup>9</sup> & Baronibz Sc<sup>9</sup>ci<sup>9</sup> n̄ri p̄dic̄ p̄ tempore existen<sup>9</sup> Heredum & Successoz n̄roz quam om̄ibz & singulis Receptoribz Auditoribz & alijs Officiarijs & Ministris n̄ris Heredum & Successoz n̄roz, Qd̄ ip̄i & eoz quilt sup̄ solam Demonstrac̄em haz L̄raz n̄raz Patenciu<sup>9</sup> vel Irrotulamentum eazdem absqz aliquo alio B̄ri seu Warrant̄ a nob̄ Heredibz vel Successoribz n̄ris quoquo modo impetrand̄ obtinend̄ seu p̄sequend̄ plenam integram debitamqz Allocac̄em & Exonac̄em manifest̄ de om̄ibz & om̄imod̄ humoi Corrod̄ Reddi<sup>9</sup> Feod̄ Añuitat̄ Pen<sup>9</sup>coibz Por<sup>9</sup>coibz & Denarioz Sum̄is & Onibz quibuscunqz, p̄terquam de p̄dic̄ Reddi<sup>9</sup> Servi<sup>9</sup> Tenur<sup>9</sup> & Denar<sup>9</sup> Sum̄is p̄antea ut p̄fertur respective reservat̄, ac p̄ p̄dic̄ Mariam Wandesforde & Willelmum Wan-

desforde Heredes Executores & Administratores suos solvendū faciendū sive pformandū de pmissis seu de aliquo pmissoz nob̄ Heredibz vel Successoribz n̄ris quoquo modo exeun<sup>9</sup> seu solvendū vel supinde vsus nos Heredes & Successores n̄ros oñat seu oñandū p̄fat Marie Wandesforde & Willelmo Wandesforde Heredibz & Assign<sup>9</sup> suis facient & de tempore in tempus fieri causabunt, Et he L̄re n̄re Patentes vel Irrotulament eozdem erunt añuatim & de tempore in tempus tam p̄dic̄t Thesaurar<sup>9</sup> Cancellar<sup>9</sup> & Baronibz Sc<sup>1</sup>ci<sup>9</sup> n̄ri p̄dic̄t Heredum & Successoz n̄roz quam oñibz & singulis Receptoribz Auditoribz & alijs Officiarijs & Ministris n̄ris Heredum & Successoz n̄roz quibuscunq; p tempore existen<sup>9</sup> sufficiens Warrantum & Exon̄acio in hac parte. Et insup de ubiori Ḡra n̄ra sp̄iali ac ex Et̄a Sciencia & mero Motu n̄ris & p & in Considera<sup>9</sup> p̄dic̄t Volumus & Concedimus ac p p̄sentes p nob̄ Heredibz & Successoribz n̄ris Damus & Concedimus ac Inten<sup>9</sup>coem & Benepl̄itum n̄rm esse declaramus qđ bene liceat & licebit p̄fat Marie Wandesforde & Willelmo Wandesforde Heredibz Executoribz Administratoribz Assignat<sup>9</sup> Deputat<sup>9</sup> Servis & Oparijs eoz vel alicui vel aliquibz eoz oñi tempore & de tempore in tempus imp̄p̄m futur<sup>9</sup> fodere h̄ere retinere & asportare quascunq; parvas Petras Anglice Small Rocks, Ac eciam Oñes & oñimod<sup>9</sup> Lapid̄s crescen<sup>9</sup> jacen<sup>9</sup> vel existen<sup>9</sup> in vel juxta p̄dcam Insulam n̄ram Vectis aut aliū Locum quemcunq; d̄ce Insule adjungen<sup>9</sup> vel adjacen<sup>9</sup> sive eciam aliū Locum quemcunq; in vel juxta p̄dc̄m Com<sup>9</sup> n̄rm South̄ que ad Ripas vel aliquod at̄ necessariū Adjumentum Op̄is p̄dic̄t erigendū sustentandū fortificandū reparandū emendendū sive manutenendū, Anglice setting upp, keeping upp, strengthning repaying amending or maynetayning the Bancks or any other necessarie Helpes of the said Worke, necessar<sup>9</sup> cōmoda vel idonea fuer<sup>9</sup>. Et ult<sup>9</sup>us Volumus ac p p̄sent<sup>9</sup> p nob̄ Heredibz & Successoribz n̄ris significamus & declaramus Benepl̄itum & Inten<sup>9</sup>coem n̄ram fore & esse Qđ neq; he L̄re n̄re Patentes nec aliquid in eisdem conten<sup>9</sup>t aliquatū se extend<sup>9</sup> ad Dona<sup>9</sup>coem sive Concessionem triū illaz

Partiu' p̄dict̄ parcell̄ Terr' nostr' inundaĩ Anglice Oazes si modo inundaĩ aut subdiĩ sit Inundaĩoi Maris Anglice overflowne or subject to the Overflowing of the Sea, aut aliĩ a Mari recupaĩ Anglice bancked fenced or wonn from the Sea ante Confec̄oem haĩ L̄raĩ ñraĩ Patenciu', Quequidem Parcelle Terr' Anglice Oaze Groundes scituatur jacent & existent occidentaliĩ a parte Portus de Langstone supramen̄onaĩ & septentrionaliĩ a quodam Loco coĩ vocaĩ Anglice Master Boulde's Salte Workes & orientaliĩ a parte Insule de Portsea p̄dict̄, Quequidem Parcelle Terr' Anglice Oaze in toto continent p̄ Estimāoem Trecent̄ & duas Acras, tres Virgaĩ & Viginĩ ptis T're sive plus sive minus cum suis Juribz Membris & ptinen' uniũsis in d̄co Com' ñro Southton, Nec ad Donāoem sive Concessionem triũ illaĩ Partiu' p̄dict̄ Mariĩ nostr' Anglice vocaĩ Salte Marshe si modo inundaĩ aut subdiĩ sit Inundaĩoi Maris Anglice overflowne or subject to the Overflowing of the Sea, aut aliĩ recupaĩ a Mari Anglice bancked fenced or wonne from the Sea, ante Confec̄oem haĩ L̄raĩ ñraĩ Paten', Quiquidem Salsus Mariscus scituaĩ jacen' & existen' orientaliĩ a Metis Anglice the Boundes Villaĩ de Wymering & Portsea in Insula de Portsea p̄dict̄ in toto continet p̄ Estimāoem Sex Acras & duas Virgaĩ T're sive plus sive minus cum suis Juribz Membris & ptinen' uniũsis in d̄co Com' ñro Southton, Nec ad Donāoem sive Concessionem triũ illaĩ Partiu' p̄dict̄ Marisci ñri Anglice vocaĩ Salte Marshe si modo inundaĩ aut subdiĩ sit Inundaĩoi Maris Anglice overflowne or subject to the overflowing of the Sea aut aliĩ recupaĩ a Mari, Anglice bancked fenced gayned or wonne from the Sea, ante Confec̄oem haĩ L̄raĩ ñraĩ Paten', Quiquidem Salsus Mariscus est scituaĩ jacen' & existen' orientaliĩ a parte Insule de Portsea p̄dict̄ & occidentaliĩ a parcell̄ Terr' inundaĩ supramen̄onaĩ & in toto continet p̄ Estimāoem duas Acras & duas Virgaĩ Terr' sive plus sive minus cum suis Juribz Membris & ptinen' uniũsis in d̄co Com' ñro Southton, Sed qđ he L̄re ñre Patentes quoad p̄dict̄ tres Partes p̄dcaĩ T'raĩ ulĩ men̄onaĩ vocaĩ the Oazes ac sepaliũ duoĩ Salsoĩ

Mariscoꝝ similiꝝ ultꝝ mençonaꝝ, Anglice the Salte Marshes  
 penitus vacue erunt & nullius Effectꝝ in Lege, Et nihilomi-  
 nus qđ ad Residuꝝ oĩuꝝ & singuloꝝ pmissioꝝ supius p  
 p̄sentes p̄concessꝝ mençonaꝝ sive intensꝝ fore concessꝝ, he  
 L̄re ñre Patentes bone & sufficientes in Lege p̄dictꝝ Marie  
 Wandesforde & Willelmo Wandesforde Heredibꝫ & Assignꝝ  
 suis imp̄p̄m stabunt & existent, Aliquo in his L̄ris ñris Pa-  
 tentibꝫ in contrariuꝝ inde non obstante. Et ultꝝius de am-  
 pliori Ḡra ñra sp̄iali ac ex c̄ta Sciencia & mero Motu ñris  
 Volumus ac p̄ p̄sentes p̄ Consideraçoibꝫ p̄d̄cis p̄ nobꝝ  
 Heredibꝫ & Successoribꝫ ñris Damus & Concedimus  
 p̄fatꝝ Marie Wandesforde & Willelmo Wandesforde Heredibꝫ &  
 Assignꝝ suis Qđ he L̄re ñre Patentes vel Irrotulamentum  
 eoꝝ erunt in oĩibꝫ & p̄ oĩa firme valide bone sufficientes  
 effcuales in Lege erga & contra nos Heredes & Successores  
 ñros tam in oĩibꝫ Curijs ñris quam alibi ubicunqꝫ infra  
 Regnuꝝ ñrm Anglie absqꝫ aliquibꝫ Confirmaçoibꝫ Licencijs  
 vel Tolleraçoibꝫ de nobꝝ Heredibꝫ vel Successoribꝫ ñris im-  
 postez p̄ p̄dictꝝ Mariam Wandesforde & Willelmum Wandesforde  
 Heredꝝ & Assignꝝ suos aut eoꝝ aliquem p̄curandꝝ aut obti-  
 nendꝝ, Non obstantꝝ male noĩandꝝ male recitandꝝ aut non  
 noĩandꝝ sive non recitandꝝ vera & recta, c̄ta & sup̄at Noĩa  
 p̄dictꝝ Terrꝝ Tenꝝ Praꝝ Pasꝝ Pasturꝝ Salꝝ Mariꝝ, Terrꝝ ma-  
 riscalꝝ que p̄antea Muris incluꝝ defenꝝ acquisitꝝ recup̄atꝝ sive  
 aliꝝ a Mari relicꝝ fuerꝝ, Anglice the Landes which hereto-  
 fore have benne bancked fenced gayned and recovered from  
 the Sea or otherwise forsaken lefte bare and drie by the  
 Sea, aut que impostez Muris includendꝝ defendꝝ acquirendꝝ &  
 recup̄andꝝ aut aliꝝ a Mari relicꝝ erunt Anglice which here-  
 after shal be bancked fenced gayned and recovered from the  
 Sea or otherwise lefte bare and drie by and from the Sea,  
 Ac Terrꝝ que quondam fuerunt aut modo inundaꝝ aut subditꝝ  
 sunt Inundaçoi Mariꝝ Anglice the Landes that formerly  
 have benne and now are overflowne or subject to the over-  
 flowing of the Sea, Et Terrꝝ vocatꝝ Vastꝝ Mariꝝ, Terrꝝ An-  
 glice Oaze at the Oazie Groundes, Laꝝ, Creꝝ, Portꝝ Anglice  
 Havens, Terrꝝ Anglice Inletts, Fittie Groundes, Glibses,

Beaches, Bolders, Littor<sup>9</sup> Coster<sup>9</sup>, Sabullosi, Aren<sup>9</sup> & celos<sup>9</sup> om̃iu et singulos p̃missos sup̃ius p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃ aut aliquam inde Partem sive Parcellam, Et Non obstante male nõiand̃ male recitand̃ aut non nõiand̃ sive non recitand̃ veras rectas & sepales Metas sive l̃minos om̃iu<sup>9</sup> & singulos sive aliquos p̃missos sup̃ius p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃ aut alicujus inde Partis sive Parcelle, Et Non Obstante male recitand̃ vel non recitand̃ aliquam Dimissionem sive Dimissiones Concessionem sive Concessionem aut aliquas L̃ras Patentes p̃ nos seu p̃ aliquem Progenitos vel Predecessos ñros de p̃missis sup̃ius p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃ seu de aliqua inde Parte sive Parcelle fact̃ existen<sup>9</sup> de Recordo vel non de Recordo vel ali<sup>9</sup> qualicunq<sup>9</sup>, Et non obstante male nõiand̃, male recitand̃ aut non nõiand̃ sive non recitand̃ vera recta & sepalia Nõia om̃iu aliquos sive sepaliu<sup>9</sup> Tenenciu<sup>9</sup> Firmarios sive Occupatos aliquos p̃missos sup̃ius p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃ aut alicujus inde Partis sive Parcelle. Et Non obstante male nõiand̃ male recitand̃ non nõiand̃ aut non recitand̃ aliquam Villam Hamlet<sup>9</sup> Parochiam Locum vel Com<sup>9</sup> in quibz vel juxta que om̃ia singula sive aliqua p̃missos p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃ aut aliqua inde Pars sive Parcelle existunt & existit. Et Non obstante male nõiand̃ aut male recitand̃ aut non nõiand̃, aut non recitand̃ aliquam Valuationem aut veram Valuationem, aut añualem Valorem om̃iu<sup>9</sup> & singulas aut aliquas Acras p̃missos p̃ p̃sentes p̃concess̃ aut meñconat̃ aut inteñs fore concess̃ aut alicujus inde Partis sive Parcelle, Aut añualem Reddi<sup>9</sup> reservat̃ de in sup̃ aliquam inde Partem sive Parcellam in his L̃ris Patentibz exp̃s̃ & conten<sup>9</sup>, Et Non obstante male inveniend̃ aut non inveniend̃ Officiu<sup>9</sup> & Officia aut Inquisitionem sive Inquisitionem om̃iu<sup>9</sup> & singulas sive aliquos p̃missos sup̃ius p̃ p̃sentes p̃concess̃ aut meñconat̃ sive inteñs fore concess̃, aut alicujus inde Partis sive Parcelle, p̃ que Tĩtulus nostr̃ inveniri debuit ante Confec̃tionem har̃ L̃rar̃ ñrar̃ Pateñ. Et Non obstante

Statuto in Parlamēt Dñi Henrici nup Regis Anglie Sexti Antecessoris ñri Anno Regni sui decimo octavo fact̃ & edit̃, Et Non obstante Statuť in Parlamento Dñi Henrici nup Regis Anglie Quarti Antecessoris ñri Anno Regni sui primo fact̃ & edit̃. Et non obstantibz aliquibz alijs Defectibz in non vere, aut non recte noĩand̃ aut non noĩand̃ cert̃ aut veť Numer⁹ Quantitať aut Quantitates Valoris aut Qualitates Acray p̃missoz & p̃sentes p̃conces̃, aut menċonãť sive inteñ fore conces̃ aut alicujus inde Partis sive Parcelle, Et non obstante aliquo alio Defectu Actu Alienac̃de Provisione sive Restrict̃de in aut aliqua Re Causa vel Maťia in aliquo inde in contrariuť non obstante. Volumus eciam &c. absq; Fine &c. Eo qđ exp̃ssa mencio &c. In Cujus Rēi &c. T. R. apud Wesm⁹ quāto decimo Die Julij.

p Bře de privato Sigillo.

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AN  
**INDEX**  
TO THE  
**PRINCIPAL MATTERS,**  
*&c. &c.*

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**A.**

**ACCOUNTS.**

In what case, though settled and signed, not conclusive.

See ATTORNEY AND CLIENT.

claration in ejectment stated, that it had been left with the wife of the tenant in possession, *the husband having absconded*, it was held to be insufficient to found a motion for judgment against the casual ejector.

*Doe d. Harrison v. Roe . . . . page 30*

**ACTION.**

*(On Bond.)*

See CONTRACT.

*(For Libel.)*

See LIBEL.

See PRACTICE (at Law)—  
REVENUE.

**ANSWER.**

Referring for impertinence.

See PRACTICE, (in Equity.)

**AFFIDAVIT.**

*(To oppose Bail.)*

See BAIL.

*(Of Service.)*

Where the affidavit of service of de-

An answer to amendments, consisting only of a denial of a statement in the bill, which the Defendant had already in effect answered in his first answer, ordered (on motion) to be taken off the file.

*Newham v. May . . . . . 117*

Where trial staid for want of,

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See MODUS.

## APPOSAL.

(Of Sheriffs.)

General orders respecting 114

## ARREST OF JUDGMENT.

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## ASSESSMENT OF DAMAGES.

The jury having, upon the trial of an action for a libel, found a verdict for the Plaintiff in the action on the issues joined upon the plea of not guilty, and also on the second and sixth special pleas, without assessing damages, and having found for the defendant in the action on the other issue as far as it related to all the other five special pleas, the Court below ordered judgment to be entered for the Plaintiff on the issue upon those pleas, *non obstante veredicto pro Defendente.*

*Clement v. Lewis*, Gent. . . . . 181

The verdict found for the Plaintiff in the action on the first issue joined on the plea of not guilty, and on the second issue in so far as it related to the second and sixth special pleas by way of justification, held

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to be imperfect by reason of the omission on the part of the jury who tried the issue to assess the damages, and therefore void. Affirmed.

*Ibid.*

The Court below having also awarded a writ of inquiry to assess the un-assessed damages on the issues found for the Plaintiff below, whereupon judgment was afterwards entered up for the damages found by the inquisition; the judgment of the Court of King's Bench in that respect was annulled for error in awarding writ of inquiry, and the final judgment reversed.

*Ibid.*

Such omission on the part of the Jury is not to be supplied by a writ of inquiry, because the Defendant would thereby lose his right to the remedy by attain for a finding of excessive damages.

*Ibid.*

The Defendant to the action therefore held to be entitled to a *venire de novo*, by reason of the void verdict for want of assessment of damages as to the issues found for the Plaintiff.

*Ibid.*

[Since this decision, see 6 Geo. 4, c. 50, s. 60, abolishing the process of attain of Juries.]

*Ibid.*

*Semble*, the Judge before whom the issues were tried should have directed the attention of the Jury to the question of damages on the finding for the Plaintiff,

*Ibid.*

K K



**ASSIGNEE.**

*See* REPLEVIN BOND.

**ASSIGNMENT.**

(Of Replevin Bond.)

*See* REPLEVIN BOND.

**AVERMENT.**

*See* PLEADING (at Law)—CONTRACT,  
No. 4.—PLEADING (Criminal.)

**ATTORNEY AND CLIENT.**

Account between Attorney and Client, although long since settled and signed, will not be considered conclusive as against the latter; and if any items of charge can be impeached, the accounts will be so far re-opened by the Court, on a bill filed for that purpose, as that the Plaintiff will be allowed to surcharge and falsify.

*Johnes v. Lloyd* . . . . . 62

A case made out by the suit, will entitle the Plaintiff to an issue at law to try the fairness of the impugned charges, although founded on bonds set up; and if he succeed in the issue, the Court will proceed with the investigation by reference to the Master.

*Ibid.*

A bond given by a Client to his Attorney, for the difference between a sum received by the latter, as a composition for a debt due to him from a debtor of both of them,

for the purpose of indemnifying the Attorney from loss by the transaction in having signed the general composition deed, held to be impeached by establishing that fact, and the amount intended to be secured by it falsified thereby, and disallowed by the Master on the reference to him of the charges set up by the accounts, and confirmed by the Court on exceptions to his report.

*Ibid.*

The Court, on such a suit, will not re-open or disturb settled accounts, further than as to the particular charges that can be impeached; and where fraud in respect of those charges is found by the Jury on the issue, that will not be sufficient to give the Plaintiff a decree for re-opening the accounts, if the fraud affect third persons, and not the Plaintiff, and was practised with the concurrence of the Plaintiff; but in a case of an Attorney and Client, it will let in the latter to set up the amount of any charges which he can impeach and falsify, and of any sums not credited to him in the accounts, to a credit for which he can shew himself to be entitled in deduction of the balance appearing against him taken from the foot of the accounts, without further disturbing the settled accounts.

*Ibid.*

Large sums in gross, as charged in such accounts, must be supported by detail of items composing them, or they will not be allowed.

*Ibid.*

All the costs of all the proceedings in Equity and at Law, of a Plaintiff succeeding in any respect, and

to any extent however small, under circumstances of misconduct on the part of the Defendant, in a case where he has been the confidential professional adviser of the Plaintiff—given to the Plaintiff.

*Johnes v. Lloyd* ..... 62

## B.

## BAIL.

1. Where it appears from the affidavits filed in opposition to bail, that they are persons of low condition and desperate circumstances, and such as ought not to have been brought before the Court to justify as bail, and they are rejected *instantly* on that ground, time will not be given to answer the affidavits, or for any other purpose.

*Anon* ..... 8

2. On an application on the part of Bail for enlarging the time for rendering their principal confined in a county gaol, under sentence of the Court of King's Bench, until eight days after the expiration of the time for which he was sentenced to be imprisoned (one year), the Court granted a rule to shew cause, which they afterwards made absolute without costs.

*Ex parte the Bail,*  
*Re Roach v. Boucher* ..... 104

## BANKRUPT.

See EXTENT, No. 2.

## BOND.

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See CONTRACT.

## C.

## CHARGE.

(*Upon real Estate.*)

See CONSTRUCTION OF WILL, No. 9,  
10, 11.

## CHARTER.

See GRANT.

## COMPOSITION.

(*For Tythes in Kind.*)

See MODUS.

## CONSTRUCTION.

(*Of Statutes.*)

See PLEADING (Criminal)—EVIDENCE  
—LANDLORD AND TENANT, 11 Geo.  
2, c. 19.

### CONTRACT.

1. It is no answer to an *action at Law* for nonpayment of the remainder of purchase money agreed to be paid to the vendor on his executing a bond conditioned to cause the title to be completed, and the premises to be conveyed to the vendee, that he, the vendor, purchased the estate sold at a sale of the property of a bankrupt, whose assignee he was.

*Willatt v. Clarke* ..... 207

2. Time is not of the essence of *such* a contract.

*Ibid.*

3. Nor is it an objection to the action that the bond was not tendered to the obligee till two years after the time when the money was to be paid by him.

*Ibid.*

4. *Pleading*.—It is not a ground for arresting the judgment, that such a tender is averred in the declaration to have been made *afterwards*, viz. on the (&c.) two years after the day when the money should have been paid, “*afterwards*” being the substance of the averment, the time under the *videlicet* being immaterial.

*Ibid.*

### CONSTRUCTION OF WILL.

1. A testator, who was a mortgagee, devising all the rest and residue of his *freehold, leasehold, and copyhold estates in possession or reversion*, together with all his goods, chattels,

&c. *mortgages* and debts to a legatee, *subject to the payment of his debts, &c.* and also appointing the legatee executor of his will:—Held not to have thereby devised the legal estate in the mortgaged premises to such legatee; and that such legal estate did not therefore vest in him, but descended to his heir at law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises, which may be so devised; yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention of the testator that the legal estate therein should pass.

*Silvester, Bart. v. Jarman.* ..... 78  
*See Miller v. Thomas 10 Bingham*

2. In a devise the words—“And I earnestly recommend to my said wife the care and protection of my affectionate (friend,) most heartily beseeching my said wife that she will permit and suffer the said (friend) to live and reside with her, and that she will afford to the said (friend) the same kind attention and tenderness which has been always shown her in my lifetime. And I seriously and warmly entreat my said wife at her decease to settle and assure to two trustees such part of my real estate as she shall think proper for the special purpose of securing to the said (person) during her natural life (in case she survives my said wife, (but not otherwise,) such an income as will enable the said (nominee) to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the en-

tire discretion of my said wife," although sufficient, *per se*, to raise a trust, do not do so where they are coupled with words of confidence in the discretion of the devisee as to the exercise of a controlling power conferred upon her by the will, such as these—"And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife, (and which she must acknowledge not to be inconsiderable,) unfettered and unlimited, in full confidence, and with the firmest persuasion, that in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference."—Held, that by the latter clause no trust was raised for the heirs at law of the testator's father, or any of them, the words and objects of the bequest being too vague, undefined, and uncertain. **GRAHAM, Baron, dissentiente.**

*Heneage v. Lord Visc. Andover* . . 230

3. A trust in equity under a will cannot be set up after the death of the person to whose discretion it had been referred to perfect it, by settling and stating the amount of the benefit to be conferred, because such a discretion is personal.

*Ibid.*

4. But the case of a charity forms an exception to that rule.

*Ibid.*

5. A recommendation or desire expressed in a will, that the devisee to whom the will declares the testator "has devised and bequeathed

the whole of his real and personal estate, unfettered and unlimited, in full confidence, with the firmest persuasion" that she will adopt it, *i. e.* "that in her future disposition and distribution thereof she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference," is not confined strictly to the heirs at law of the original testator, but may be applied to any or either of all his direct descendants.

*Meredith v. Heneage* . . . . . 306

6. Thus, in such a case, the second testator may devise to a son of a younger daughter of the youngest sister of the first devisor, in preference to the daughter of an elder sister, and to the only son of the same youngest sister of the first testator.

*Ibid.*

7. It is not the true construction of the terms of such a devise, accompanied with such a trust, that the estate should be given entire and altogether to any one of the first testator's heirs or descendants.

*Ibid.*

8. Notwithstanding the terms of the will of *John Walker Heneage*, expressing confidence that his devisee would devise the whole of his devised estate together and entire:—Held, that the testatrix was not bound thereby to make such entire disposition of the whole.

*Ibid.*

9. Charges imposed by will, creating a term upon real estate, to be paid out of the rents and profits, are

*prima facie* to be paid out of the *annual* rents and profits. Such is the *prima facie* meaning of the words.

*Heneage v. Lord Andover* ..... 316

10. The same words may mean that the charges shall be satisfied by sale or mortgage of, or of part of the estate, as where it would be necessary to give effect to the charge on the property, according to the intention of the testator, and where the tenant for life is also remainder-man in fee. *Ibid.*

11. Where it is a question of construction of the meaning of the will, to be determined by intention of the testator, recourse must be had to the general tenor of the whole will. *Ibid.*

(Of Grant.)

See GRANT.

### COSTS.

See PRACTICE (in Equity), Nos. 4, 6, 7.—ATTORNEY AND CLIENT.

The Court refused a motion for special direction to the Master, requiring him to deduct in his taxation of the costs of the parties, the costs which he should allow to the Defendant from those which he should allow to the Plaintiff (who had become insolvent) after the decree had been passed and acted upon.

But they refused the application, without costs.

*Rumney v. Beale* ..... 113

### COUNT.

See PRACTICE AT LAW, No. 1.—INFORMATION.

### COVENANT.

(Where binding in Equity.)

1. A covenant in a deed of separation, that the husband shall pay the trustee for the wife an annuity for her maintenance, is binding on the husband, and may be enforced in equity, although there be no covenant on the part of the trustee to indemnify the husband.

*Ross v. Willoughby* ..... 2

A general demurrer to a bill for an account of assets and payments of such an annuity overruled.

*Ibid.*

### D.

### DAMAGES.

See ASSESSMENT of.

### DECLARATION.

(In Ejectment.)

Service of.

See AFFIDAVIT.

### DEMURRER.

(In Equity Pleading.)

1. General demurrer to a bill in equity for an account and payment of arrears of annuity to a wife, under a covenant in deed of separation, executed to her by a former husband, on the ground that the trustees had not covenanted to indemnify the husband, overruled.

*Ross v. Willoughby* ..... 2

2. In the argument of a general demurrer, laches in filing the bill cannot be taken into consideration by the Court. It should be pleaded.

*Ibid.*

### DEVISE.

See CONSTRUCTION (OF WILL.)

### DISTRESS.

(*For Rent Arrears.*)

See LANDLORD AND TENANT.

## E.

### EJECTMENT.

Affidavit of service of declaration—what insufficient to found judgment against casual ejector.

See AFFIDAVIT.

### ELECTION.

(*To proceed at Law, or in Equity only.*)

In what case Plaintiff compelled to elect, and by what means.

See PRACTICE in Equity, No. 6.

### ENLARGING TIME.

(*For rendering principal by Bail.*)

See BAIL, No. 2.

### EVIDENCE.

(*In Criminal Cases.*)

1. To support an indictment charging the forging of foreign negotia-

ble instruments in this country, on the 43 Geo. 3. c. 189. s. 1., it is sufficient to show that an instrument had been forged here resembling such as, if genuine, pass currently instead of money abroad.  
*The King v. Goldstein* ..... 88

See PLEADING (*Criminal.*)

(*In Civil Actions.*)

2. What necessary to be proved to support action on 11 Geo. 2. c. 19.

See LANDLORD AND TENANT.

(*In Tithe Cases—in Equity.*)

3. Where a vicar-general's title is admitted, it is not necessary for him to prove more than perception of the particular tithes demanded by the bill to be paid to him in kind by composition, and the Defendants cannot insist on such payments as moduses.

*In support of penal Informations.*

See PRACTICE (*at Law,*) No. 1, 2.

### EXTENT.

(*In aid.*)

See PRACTICE (*at Law.*) (REVENUE.)

1. The Court refused to grant a fiat for an extent on an application made by a committee of a lunatic against a preceding committee (on the usual bond to the Crown) where he had been declared bankrupt under a commission of bankruptcy, issued against him so long as ten years before the application.

The remedy of the party is by *scire facias*.  
*In the matter of Lacy* . . . . .135

EXCEPTION.

(*To Examination on Interrogatories.*)  
Not to be set down in future, but an order to review report must be obtained.  
*General Order* . . . . .167

F.

FEME COVERT.

See PRACTICE (*in Equity*). No.

FORGERY.

See PLEADING (*Criminal.*)—EVIDENCE.

FRAUD.

See LANDLORD AND TENANT.

G.

GRANT.

(*Royal, by Letters-Patent.*)  
*What may be the subject of.*

1. The Crown may grant, by letters-

patent, to a corporation, a town and borough, being caput portus, as Portsmouth, and all the lands between the high and low water marks: but this subject-matter of grant, as being *jus privatum* in the king, must be subject to the *jus publicum* or public right of the king and people, to the easement of passing and repassing both over the water and the land.  
*Attorney-General v. Burridge* . . . .350

2. Obstructions to such a right may be a nuisance.  
*Ibid.*

3. The question of nuisance is matter of fact.  
*Ibid.*

4. The Court of Exchequer has jurisdiction to entertain a suit for abatement of such nuisance.  
*Ibid.*

5. The mode of proceeding in such suit may be by information by English bill; and the Court may determine the question on evidence, or may direct an issue.  
*Ibid.*

6. Construction of royal charter, and validity of grant of the Crown by letters-patent.  
378

7. Where a part of the sea-coast or shore, being the property of the Crown, and giving *jus privatum* to the king, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect nuisance by working injury to the public right: or it is a grant which does not divest the Crown or invest the grantee.  
*Ibid.*

8. *Semble*, that grants of the Crown for the benefit of the king, by augmenting the revenue, founded on inquisition ad quod bonum, must be conformable with the finding—must be for the advantage of the Crown—must be acted upon promptly—must be upheld by possession and enjoyment—and the grantees must fulfil all continuing considerations, or the right of possession will not pass thereby from the Crown.

*Attorney-General v. Parmeter.* 378

## H.

### HEIRS.

1. Meaning of the word "heirs," as designatio personæ.

*Meredith v. Heneage* ..... 306

2. In what respects, and by what bequests or devises, the will of a devisee complies with the directions of the will of the first testator. *Ibid.*

## I.

### IMPERTINENCE.

(*Reference of, to Master.*)

See PRACTICE (*in Equity*.)

### INFORMATION.

See PRACTICE AT LAW, No. 1.

(*Revenue.*)

1. A count in an information framed on the 2d sect. of the 43 Geo. 3. c. 56. charging the *owner* of a ship with *engaging* to take on board a greater number of persons than allowed, held to be a good count, and to be proved by evidence of the owner being on board as master, and having such persons on board.

*Attorney-General v. Vew Lette*.... 9

2. A rule—to show cause why the judgment should not be arrested, on the ground that the count on which it had been entered up, was bad, and unsupported by the enactment and the evidence; and that the Attorney-General could not afterwards shift the verdict which he had elected to take on the count said to be bad,—discharged. *Ibid.*

### INDICTMENT.

See PLEADING (*Criminal.*)

### INJUNCTION.

(*Cause for Dissolving.*)

See PRACTICE (*in Equity*), Nos. 1. 4.

Where trial staid by, for want of answer.

See PRACTICE (*in Equity*), No. 7.

To stay waste by cutting timber granted, although the Court be not sitting.

See PRACTICE (*in Equity*), No. 8.



**INSOLVENT DEBTORS.**

*See PRACTICE (at Law), No. 1.*

**INSURANCE.**

*See PRACTICE (in Equity), No. 4.*

**INQUIRY of Damages, (Writ of.)**

*See SERVICE.*

**INTERROGATORIES.**

*See PRACTICE (in Equity), No. 10.*

**IRREGULARITY,**

*(When to be taken advantage of.)*

*See PRACTICE (in Equity).*

**ISSUE.**

*(In Tithe Cases.)*

Where a modus was set up to a bill for tithes, and it was objected that it was not sufficiently stated and defined, and that it had not been clearly shown in respect of what lands it was pleaded, it was held that the Court might determine such a case without issues, notwithstanding there was conflicting evidence in the cause.

*Southwood v. Foreman. . . . . 327*

*In Cases of Information by English Bill.*

Where ordered.

*See GRANT.*

**J.****JUDGMENT.**

*(Against casual Ejector.)*

*See AFFIDAVIT.*

*(Arrest of,)*

Where refused.

*See LANDLORD AND TENANT.—CONTRACT, No. 4.*

*(Pleading, Record of.)*

*See PLEADING (at Law, in Civil Action.)*

Where ordered to be entered for the Defendant, notwithstanding verdict for Plaintiff.

*See ASSESSMENT OF DAMAGES.*

**JURISDICTION.**

*(Of Superior Courts.)*

Where not transferred exclusively to magistracy.

*See LANDLORD AND TENANT.*

*(Of Exchequer.)*

The Court of Exchequer has jurisdiction to hear an information by English bill for the abatement of a public nuisance, or a purpresture

on the King's rights, and may decree an abatement and removal.

*Attorney-General v. Parmeter* . . 378

*Mode of Proceeding.*

The King's Attorney-General, on the part of the Crown, may proceed in such cases for the purpose of protecting either the *jus privatum* of the king from the purpresture, or the *jus publicum* of the subject from nuisance, by information on the King's Remembrancer's side of the Exchequer, by English bill, praying a personal decree against the Defendant's in the suit.

*Ibid.*

L.

LANDLORD AND TENANT.

1. In an action upon the statute of 11 *Geo. 2. c. 19. s. 3.* against a Defendant, for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the Defendant, if by other evidence he is proved to have contributed to the facility of it: and *circumstances of suspicion* may be laid before the jury, to prove such a fraudulent co-operation as the legislature contemplated.

*Stanley v. Wharton* . . . . . 138

2. It is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated. It is enough if the rent be shown to be in ar-

rear, and that the goods have been removed afterwards.

*Ibid.*

3. The remedy given by the 4th sect. of the statute, of applying to two magistrates in a summary way, where the amount in value of goods removed is under 50*l.* is cumulative, and the landlord may elect, at his option, whatever course may be most convenient to him to adopt; and therefore the Courts of Law are not ousted of their jurisdiction by that provision.

*Ibid.*

4. The Court refused to grant a rule to arrest judgment on that last objection, and they refused to grant a rule to show cause why a new trial should not be had on the former objections.

*Ibid.*

LETTERS-PATENT.

(*Construction of.*)

*See GRANT.*

(*Effect of.*)

*See GRANT.*

LACHES.

*See PLEADING (in Equity)—PRACTICE (in Equity), No. 1.*

LIBEL.

An account published in a newspaper of proceedings in a Court of

Law, containing matter redounding to the discredit of a person in his business of an attorney at law, is, whether true or false, rendered actionable as libellous by the paragraph being headed or introduced with the line "Shameful Conduct of an Attorney."

Pleas, by way of justification, therefore, in such a case, averring that the supposed libel contained a faithful and true account of the proceedings in a Court of Law, were determined to be bad pleas, by reason of the preceding words. Affirmed on Writ of Error. *Clement v. Lewis*, Gent. . . . . 181

LIEN.

- 1. A party who, having lent money to enable a Vendee of property sold, to pay the Vendor part of the consideration for the purchase, a bond with sureties being executed to him for the remainder, takes a security for re-payment by assignment of the subject-matter, with the privity and knowledge of the Vendor, the whole matter being recited in the original deed:—Held, that on second sale by the Vendee to satisfy all demands, the original Vendor had not such a lien on the purchase money, for what remains due to him, as would defeat, or as should be preferred to that of the mortgagee. *Cood v. Pollard* . . . . . 109
- 2. *Quære*, How far, and in what cases, taking security for payment of purchase money is a waiver by Vendor of his lien on the purchase money upon a subsequent sale by the Vendee. *Ibid.*

LUNATIC.

(Committee of.)

See EXTENT.

M.

MEMORANDA. 1

MODUS.

- 1. Moduses pleaded as in the answer set forth in the statement of the pleadings in this case:—Held, not to be ill pleaded; but to be well and sufficiently laid as a defence to a bill for tithes, where it had been objected at the bar by the Counsel for the Plaintiff, 1st. That the moduses, as there pleaded, were badly and insufficiently laid, having left it wholly in doubt, and uncertain to what lands, or to what portion of the lands, they were meant to be pleaded; or, in other words, that the lands in respect of which the particular tithes were meant to be shown to be covered thereby, were not set forth with sufficient certainty: and, secondly, That the character and nature of the moduses set up had not been distinctly stated or shown. *Southwood v. Foreman* . . . . . 327
- 2. The Court may determine such a case without issues, notwithstanding conflicting evidence. *Ibid.*

## N.

## NOTICE.

*(Of Executing Writ of Inquiry.)*

See SERVICE.

## NUISANCE.

*(Public.)**In Ports and Harbours.*

Buildings, erections, and inclosures between the high and low water marks in the harbour of Portsmouth, interrupting the flux and reflux of the tide, abated by decree of the Court of Exchequer as a nuisance, where made under the sanction and authority of the Corporation having a grant from the Crown by charter.

*Attorney-General v. Parmeter* . . . 378*Parmeter v. Attorney-General* . . . 412

## O.

## ORDER OF COURT.

*(For opposing Sheriffs.)* 14*(As to Interrogatories exhibited and Exceptions.)* 169

## P.

## PARTIES.

*(To Suits at Law.)*

Where assignee of sheriff of replevin

bond may sue thereon in his own name under the statute.

See PLEADING *(at Law.)**(To Conveyance.)*

Held, therefore, on a bill filed for a re-conveyance of mortgaged premises, where a testator, who was a mortgagee of the property, was held not to have devised the legal estate therein, on payment of the money remaining due on the mortgage, that the heir at law of the testator was a necessary party to the re-conveyance of the estate.

*Silvester v. Jarman* . . . 38See CONSTRUCTION *(of Will,)* No. 1.

## PENALTIES.

See INFORMATION.—PRACTICE AT LAW *(Revenue.)*PETITION, *(for rehearing.)*See PRACTICE *(in Equity)*, No. 4.

Presenting such petitions is a mere formality, on which the order is obtained from the Chief Baron's secretary as of course, and a motion on it is unnecessary and improper.

*Duncan v. Worrall* . . . 32

## PLEADING.

*(At Law in Civil Actions.)*

1. A sheriff who has taken a replevin bond is not bound in every respect to pursue the terms of the 11 Geo. 3. c. 19. s. 23.

*Dunbar v. Dunn* . . . 54

2. Such a bond may be proceeded on in the name of the assignee.

*Ibid.*

See REPLEVIN BOND.

3. In an action on such a bond it is not necessary to aver that a return of the goods has not been made where there is an averment that the suit has not been prosecuted with effect.

*Ibid.*

See REPLEVIN BOND.

*Pleading a Tender of Bond for Execution.*

See CONTRACT, No. 4.

4. The Plaintiff in an action of debt against a sheriff for an escape of a debtor of the Plaintiff, in execution under a *capias ad satisfaciendum*, alleged in his declaration, (*Michaelmas* term, 2 *Geo.* 4.) issued on a judgment by default, that he (the Plaintiff) thencefore, to wit, in *Hilary* term in the second year of the reign of the now king, recovered judgment against the debtor in an action of *assumpsit*, as by the record and proceedings thereof, now existing, &c. more fully and at large appears. *Seemle*, that allegation of a judgment recovered in *Hilary* term, 2 *Geo.* 4. is proved by a record of a judgment recovered in *Hilary* term 1 & 2 *Geo.* 4.

*Bennett v. Isaac* ..... 154

5. To prove that averment, the record of the cause and judgment was put in, whereby it appeared that the judgment was recovered in *Hilary* term, in the 1st and 2d years of *Geo.* 4. The marginal note to the roll stated that the judgment was signed the 26th of *March*, 1821.

*Ibid.*

6. It was objected on the trial, and on a motion to set aside the verdict found for the plaintiff, that there was a material variance between the allegation in the declaration and the record produced in evidence; and that the variance was fatal, as the proof had failed to support the allegation, which, as it concluded with a *prout patet per recordum*, was matter of *description*; and therefore ought to have been proved *ad literam*. Determined not to be a material variance even if it were a variance in fact, and not merely an imperfect intelligible reference to the record.

*Ibid.*

7. Where the action is not founded on the record referred to, it is sufficient if the description of it, used for the purpose of reference to it alone, describe it intelligibly enough for that end; for if it be referred to as a matter of fact, and not essentially as the basis of the action by allegations in the declaration, they are not matter of substance, and such a variance between the description of it and the allegation, as does not leave any doubt as to identity of the record referred to, is not material, although concluding with a *prout patet per recordum*, for those words do not make certainty of description in the allegation material, where without them it would be immaterial.

*Ibid.*

8. The Court will notice legal fictions, to avoid their working injustice by affording ground for objections merely technical, and having no other, or real foundation.

*Ibid.*

(*Plea by way of Justification of Libel.*)

In what case bad.

See LIBEL.

PLEADING.

(*Criminal.*)

1. The averment necessary in pleading, and facts necessary to be proved to establish a case of forgery in respect of common *English* negotiable instruments generally, do not apply to instruments within the statute, the word "purporting" therein applying rather to the object and intention of the maker in putting it into circulation, than to any form of words constituting the instrument.

2. In an indictment for forgery founded on that statute, it is not only necessary to set out the instrument charged to be forged on the record, in the foreign language in which it may be worded; but there must also be an *English* translation of the instrument, however inefficient and unintelligible such translation might be; or the indictment will be fatally defective for want of it. It cannot be supplied by evidence: and a conviction founded upon it cannot be supported.

2. For that reason, the judgment upon a conviction of that offence, on evidence, was arrested, and the convict discharged.

*The King v. Goldstein* ..... 88

See EVIDENCE.

PLEADING.

(*In Equity.*)

See COVENANT.—DEMURRER.—INFORMATION.

(*Setting out Moduses in an Answer.*)

See MODUS.

PORTSMOUTH HARBOUR.

(*Case of.*)

See GRANT.—JURISDICTION.—NUISANCE.

PRACTICE.

(*At Law.*)

See AFFIDAVIT, 2.—SERVICE (OF PROCESS,) 3.—BAIL.

1. Where the Defendant had applied to the Court for the Relief of Insolvent Debtors for his discharge generally, and that Court remanded him for a certain period, this Court refused a motion for a writ of *supersedeas* to discharge him as to the action, made on the ground that the Plaintiff had not delivered a declaration to the Defendant, or at the gaol, within two terms after the return of process, because they considered that the circumstances afforded sufficient cause why they should not grant the application.

*Garlick v. Ballingar* ..... 124

PRACTICE.

(*At Law.*)

[*Revenue Proceedings.*]

1. If, on an information by the At-

torney-general, for penalties for breach of a navigation law, the jury find a general verdict, and it be taken on a particular count, the Court will afterwards permit it, on motion, to be entered on any other count, if that elected should prove to be defective, or unsupported by the evidence as applied to the statute; for such informations are not to be considered as in the nature of *qui tam* actions on statutes merely penal, in which that cannot be permitted to be done.

*The Attorney-General v. Vew Lette* 9

2. Rule to show cause why the judgment should not be arrested in such a case, on the ground that the count on which it had been entered up was bad, and unsupported by the enactment and the evidence, and that the Attorney-General could not afterwards shift the verdict which he had elected to take on the count said to be bad, to a good count in the information.—  
Discharged.

*Ibid.*

3. The Court will not set aside any part of a record *on motion*, nor order a replication to a plea to an extent to be struck out because not consistent with, or at least not pursuing the facts stated in, the affidavit on which the fiat was granted.

*The King v. Burberry* ..... 46

4. Thus where an extent *in aid* had been issued on a fiat founded on an affidavit, stating, that the Prosecutors of the extent were jointly and severally *bound by writing obligatory* to the Crown, conditioned for the returning all sums of money which they should receive from the Collectors of Excise, which bond was

still undischarged; and that *they were indebted to his Majesty for money received by them from the Collector for his Majesty's use*: the Defendant having pleaded that *they were not indebted to the Crown* at the time of issuing the extent, *by receipt of any money for the use of his Majesty*, and for the answering, &c. of which *they were bound* to the King by their said bond. The Attorney-General replied, 1st, affirmatively, *in the words of the plea*: 2dly, that the prosecutors of the extent did not pay to the Commissioners of the Excise money received by them from the Collector within twenty-one days after the receipt thereof, according to the condition of the bond (in the words of the condition,) but that the same remained in their hands after, &c. whereby the bond became absolute and forfeited: and there were two other replications, negating performance in the words of the condition of the bond; the Court refused to set aside the latter replications, on the objection raised by motion made for that purpose, that they were a departure from the statement in the affidavit on which the extent was founded and the fiat granted, and yet they might enable the prosecutor to succeed in supporting the extent, and obtaining judgment, although the affidavit should be wholly false, and the true circumstances such, as that if they had been known to the Baron when the application was made for the extent, it would not have been granted.

*Ibid.*

5. But the Court observed, that if on the trial of the cause there should appear any reason for considering the proceedings to be so framed,

for the purpose of unduly obtaining an extent which could not be supported, the Defendant would be protected by the Court, who would stay the proceedings after verdict; and on an application by the Defendant, would recollect that this motion had been made.

*The King v. Burbarry* ..... 46

### PRACTICE.

(*In Equity.*)

1. Reference of an answer for impertinence is good cause against dissolving an injunction.

*Joseph v. Simpson* ..... 25

2. There was heretofore no time limited in this Court within which, on an answer being referred for impertinence, the party obtaining the order was bound to procure the Master's report, but now the report must be obtained within four days.

*Ibid.*

3. Application to discharge order for irregularity must be made without delay; and it is no excuse for not applying that the Court did not sit since the order complained of was obtained; because the Lord Chief Baron may, since the statute of 57 Geo. 3. hear matters in equity in this Court on any day, and may adjourn for that purpose *de die in diem*. The Court of Exchequer, like the Court of Chancery, is now open as a Court of Equity, during the whole year.

*Ibid.*

4. A bill was filed by underwriters, against whom an action had been brought on certain policies of insurance, for a total loss, praying an answer; *that the policies might*

*be delivered up to be cancelled*; an injunction; a commission to examine witnesses abroad; *and further* relief. On the hearing, the bill was dismissed with costs, the Plaintiffs having a defence at law in the usual course. The trial at law proceeded, and the Defendants (the Plaintiffs in equity) succeeded in the action, the jury finding a verdict for them, on the ground that the vessel insured was not neutral property, as she had been represented by the insured to be. The Plaintiffs in equity then presented a petition for a rehearing, on account of the question of costs, founding the prayer of the petition on the ground of their bill having been a bill substantially for relief as well as for discovery, because it had prayed that the policy might be cancelled. The Lord Chief Baron, on the rehearing, after expressing strong and emphatic reprehension of such a proceeding for such a purpose, and lamenting his being under the necessity of ordering such relief as erasing the Plaintiffs' names from the policy would be, made the order, but without costs.

*Duncan v. Worrall* ..... 31

His Lordship, in the course of the discussion, declared, on the authority of very long experience in cases of this sort, in the Exchequer, that he did not believe that any such case had ever been brought to a hearing; and discredited the dicta attributed to the Lord Chancellor, in the reports of the cases of *Jervis v. White*, and *Bromley v. Holland* (*ubi infra*), from which it was inferred, that it was the course in this Court to bring such causes to a hearing for the sake of the relief.

L L

*Ibid.*



*See* PETITION.

5. Where the Defendants, occupiers of land, in respect of which a suit had been instituted against them for tithes, set up a defence of title to the tithes in their landlord, and produced in evidence on the hearing of the cause certain deeds belonging to their landlord, the Court made an order, on an application by petition, that the Defendants should produce such deeds on the trial of an issue granted, or that they should upon the trial admit the fact, which it was alleged the deeds would establish, although the deeds belonged to their landlord, who was not a party to the suit.

*Pulley v. Hilton* ..... 118

6. Plaintiff in a suit by bill for tithes having commenced an action at law for the treble value of part of the tithes, ordered (on motion) to elect within six days to proceed at law or in equity only, and the action at law to be stayed with costs, or the bill to be dismissed with costs, and the costs of the motion.

*Taunton v. Glyde* ..... 129

7. An injunction until answer, or further order, having been obtained for want of answer, against a party residing abroad, to restrain proceedings in an action at law, the Court refused a motion to allow the Defendant to proceed to trial before the Defendant had answered.

The Court ordered the Defendant to pay the costs of opposing the motion.

*M'Callam v. Beall* ..... 130

8. Since the 57th Geo. 3. c. 18. the Court of Exchequer. for certain

purposes, is considered open all the year round as a Court of Equity.

The Lord Chief Baron therefore will take motions for special injunctions to stay waste, and in other matters which press, during the vacation (when the Court are not sitting), at his private residence, or whilst on circuit.

*Tucker v. Sanger* ..... 132

*Galloway v. Appleton* ..... 133

*Creswell v. Long* ..... *ib.*

*Williamson v. Thompson* ..... 134

*Rigby v. Drakeley* ..... *ib.*

9. The Court will not act upon the separate examination of a married woman, in disposing (according to her direction) of a fund in Court, the amount of her share of which has not been ascertained and stated by the Master's report.

*Godber v. Laurie* ..... 152

10. Nor whilst any part of the share of the feme covert is not so ascertained, will the Court dispose of such specific part as is reported to belong to her.

*Ibid.*

11. The party exhibiting interrogatories before a Master for examination of the adverse party, cannot set down exceptions taken to the examination for insufficiency, to be argued before the Court, but must obtain an order to refer it to the Master, to review his report, and to report thereon, with liberty to except.

*General Order* ..... 169

## PRODUCTION.

(*of Deeds.*)

*See* PRACTICE (*in Equity.*)

## PROMOTIONS.

1

## PURPRESTURE.

*See* GRANT.

## PROOF.

*(Of Offences against Revenue Laws.)*

What sufficient to sustain information  
on the 43d Geo. 3. c. 56. s. 2.

*. See* INFORMATION.—EVIDENCE.*(Of Contract.)*

In an action brought on an agreement to pay money for work to be done, on the production of the certificate of a third person that he approved the work, (the declaration also having the common counts,) the Plaintiff produced on the trial a *Bill of Charges* for the work done, which had been submitted to such third person, (who, it was proved, had attended the progress of the work,) under which he had written and signed the following memorandum: "On examining the annexed bill, and considering the circumstances of the case referred to me, I am of opinion that a reduction should be made of 12*l.* 11*s.* 6*d.*;" but that person being afterwards called as a witness for the Defendant, stated, that he never had approved the work, but disapproved it, and would

not have signed a certificate of approval: the jury, on the whole case, found for the Plaintiff. Held, that the verdict of a jury ought not to be disturbed under the circumstances; and therefore the Court refused to make absolute a rule granted to show cause why there should not be a new trial, on the ground that the action could not be maintained without proof of such certificate.

The Defendant should have asked, at the trial of the cause, for leave to move to enter a nonsuit.

*De Vile v. Arnold* .....21

## R.

## RECOMMENDATION.

Effect of in will.

*See* CONSTRUCTION OF WILL.

## REHEARING.

*See* PRACTICE (*in Equity*), No. 4.

## REFERENCE.

*(To Master.)**See* PRACTICE (*in Equity*.)

## REPLEVIN BOND.

1. A Sheriff taking a bond with sureties from a tenant replevying his

goods distrained for rent, is not bound to pursue in every respect the terms of the 11 Geo. 2. c. 19. s. 23: and a bond conditioned to prosecute the action (in replevin) with effect, and to indemnify the sheriff, is good, and may be assigned and proceeded on in the name of the assignee under the statute, although it do not require by the condition that the suit shall be prosecuted *without delay*, and although it contain an undertaking to indemnify the sheriff. Held, on a writ of error brought on objections founded on those grounds, that the one term is not exacted by the statute, nor the other excluded or prohibited; and that neither the omission in the one case, nor the insertion in the other, is error.

*Dunbar v. Dunn* ..... 54

2. It is not necessary, in an action on the bond, to aver that a return has not been made, although it appear on the face of the declaration to have been awarded, where it is averred that the suit has not been prosecuted with effect. A breach of either of the conditions for prosecuting with effect, returning the goods, or indemnifying the sheriff, will singly be sufficient to support the action.

*Ibid.*

## REPORT.

(*Of Master.*)

See PRACTICE (*in Equity.*)

## RELIEF.

(*In Equity.*)

See PRACTICE (*in Equity*), No. 4.

## REMOVAL.

(*Of Goods.*)

(*To defraud Landlord.*)

See LANDLORD AND TENANT.

## RENDER.

(*Of Principal by Bail.*)

See BAIL, No. 2.

## RENTS AND PROFITS.

Meaning and effect of those words in a will.

See CONSTRUCTION OF WILL.

## RETURN.

(*Of Goods seized for Rent.*)

Not necessary to be averred in action on replevin bond.

See PLEADING (*at Law.*)

## S.

## SCIRE FACIAS.

See EXTENT.

SERVICE. (*of Process.*)*Declaration in Ejectment.*

See AFFIDAVIT.

*(Of Notice of Writ of Inquiry.)*

It is no objection to the service of notice executing a writ of inquiry, that *it was left at Defendant's house in the country*, during his temporary absence from home; nor that such notice had not been entered in the order book in the office of *Pleas*, nor had been served on his Attorney or Clerk in Court in the cause, nor any notice given to either of them, of such entry.—*Notice of executing writ of inquiry does not require the signature of a clerk in Court.*

*Knibbs v. Hopcraft*.....147

## SHERIFF.

See REPLEVIN BOND.—APPOSAL.

## SUPERSEDEAS.

See PRACTICE (*at Law.*)

## T.

## TENDER.

*(Pleading.)*

See CONTRACT, No. 4.

## V.

## VERDICT.

*(Shifting from one count to another, to meet proof, &c.)*

See INFORMATION.

## VARIANCE.

See PLEADING (*at Law—Civil Action.*)

## VENDOR AND VENDEE.

See LIEN.—CONTRACT.

## VENUE.

1. Where a rule nisi had been granted for changing the venue, the Court would not discharge it on an affidavit stating that the cause of action arose in two *other* counties than that in which the venue had been laid; although the affidavit also stated circumstances to show that fact, and falsify the Defendant's (the common) affidavit, where the Plaintiff would not undertake to give material evidence in the county of the original venue.
2. Nor would the Court, under the circumstances, change the venue to the third county, although the declaration laid the *indebitatus* in *Stafford*, in the first count, and in the others "in the county aforesaid."
3. Statement by the Court of the general principles, and the ground of the practice in this respect in all cases.

*Whitehouse v. Hudden*.....171

## VENIRE DE NOVO.

See ASSESSMENT OF DAMAGES.

The course of practice in such cases, to correct the erroneous proceeding of the Court below, is to remit to them the record, requiring them "anew" to command the sheriff to cause a jury to come &c. to try (&c. the issue and part of issue found for the plaintiff.)

*Clement v. Lewis*.....181

## W.

## WRIT OF INQUIRY.

*(Service of Notice of.)*

See SERVICE,

*(Assessing Damages under.)*

See ASSESSMENT OF DAMAGES.

CITY.

CITY.

of.

and.

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